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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. [redacted] 92

AMERICAN EMPIRE INSURANCE COMPANY OF SOUTH DAKOTA, a South Dakota Corporation, on Behalf of Itself and All Other Insurance Companies Who Were Shareholders in the USAFORM Hail Pool, STUYVESANT INSURANCE COMPANY, a New York Corporation, on Behalf of Itself and All Other Insurance Companies Who Employed U. S. & Foreign Management, Ltd. and USAFORM Pan-American, Ltd. As Reinsurance Brokerage Agents; USAFORM Hail Pool, Inc., a Florida Corporation; U. S. & FOREIGN MANAGEMENT, LTD., a New York Corporation; U. S. & FOREIGN MANAGEMENT, INC., a Florida Corporation, BARBARA MURPHY, As Receiver for Each of Said Corporations; USAFORM Pan-American, Ltd., a Delaware Corporation,

Petitioners,

vs.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Maryland Corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Maryland Corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The above-named Petitioners, by their undersigned attorney of record, pray that a Writ of Certiorari issue to review the judgment entered in this case on March 6, 1969, by the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The Federal District Court Summary Final Judgment was issued November 14, 1966 (R. 254), but an opinion was not written by that Court. The opinion of the Circuit Court of Appeals (R. 265) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered March 6, 1969 (R. 283). On April 3, 1969, the Court of Appeals denied Petitioners' Petition for a Rehearing (R. 299). The jurisdiction of this Court is invoked under 28 U.S.C.A., Section 1254(1), U. S. Code, 1964, Volume 7, Section 1254(1), Title 28, page 5958.

QUESTIONS PRESENTED FOR REVIEW

1. When the terms of an insurance policy specifically insure property held by the named insured "in any capacity, whether legally liable therefor or not", and the insurer knew all the facts including:

(a) the fact that the third party owned the property insured under the policy;

(b) the fact that the insurance policy contemplated management by the named insured of the third party's property;

(c) the fact that the third party was relying on the protection afforded by the insurance policy; and

(d) the proceeds of any recovery under the policy will belong to the third party;

does the third party have the right of direct action on the policy as a third party beneficiary?

2. When the terms of an insurance policy specifically insure property held by the named insured "in any capacity, whether legally liable therefor or not", and the insurer knew all the facts including:

(a) the fact that the third party owned the property insured under the policy;

(b) the fact that the insurance policy contemplated management by the named insured of the third party's property;

(c) the fact that the third party was relying on the protection afforded by the insurance policy; and

(d) the proceeds of any recovery under the policy will belong to the third party;

is the third party a "real party in interest" under Rule 17(a) of the Federal Rules of Civil Procedure, 28 U.S.C.A., entitled to sue directly on the policy?

3. Where the Court of Appeals failed to consider an error specified and a question presented by appellants, has that Court denied appellants their right of appeal, thus justifying the issuance of a Writ of Certiorari by this Court?

4. Is the Summary Final Judgment issued below in conflict with the decisions of the Supreme Court of the State of Florida which forbid granting summary judgment where there remains any possible issue of material fact and requires that all inferences of fact from the proof proffered be drawn against the movant and in favor of the party opposing the motion?

STATUTES

Rule 17(a) Federal Rules of Civil Procedure, 28 U.S.C.A.:

> "a. Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States."

Florida Statutes, § 626.0605:

> "*Misrepresentations in adjustment of claims.*—No person shall in connection with adjusting any claim, loss or damage under a contract or policy of insurance, misrepresent to an insured or any other person having an interest in the proceeds payable under such contract or policy, the terms, coverage or effect of such contract or policy, for the purpose and with the intent of effecting settlement of such claim, loss or damage under such contract or policy on less favorable terms than those provided in and contemplated by such contract or policy."

STATEMENT OF THE CASE[1]

This is a suit on a Fidelity Bond occasioned by the theft of monies held in trust for others. The thief was the sole stockholder, and admittedly, the alter ego of the trustee corporation, designated as the named insured in the Fidelity Bond (R. 5, 6). The principal issue before the Circuit Court of Appeals was whether the beneficial owners of the stolen property had the right of direct action against the insurer or whether the action had to be brought by the named insured, who was the thief.

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1. This case involves three groups of Claimants, U. S. & Foreign Management, Ltd., and the insurance companies for which it was the insurance broker, USAFORM Pan American, Ltd., and the insurance companies for which it was the insurance broker, and USAFORM Hail Pool, Inc., and the insurance companies participating in the Hail Pool. Throughout the litigation the first two groups of insurance companies, those doing business with U. S. & Foreign Management, Ltd., and those doing business with USAFORM Pan American, Ltd., are referred to as the underwriters group and the third group of insurance companies, those doing business with USAFORM Hail Pool, Inc., are referred to as the Pool Participants. The facts and legal principles involved are substantially the same for the three groups and the Courts below treated the three groups in the same manner, which was appropriate. As F & D's underwriter testified on deposition (R. 186):

> "Q. So the money that the underwriters group had would be protected by virtue of Section 5 of the bond just as much as the Hail Pool Participants' money would be protected.
> A. That is correct. In connection with a dishonest act.
> Q. Now, actually, to your knowledge, F & D's knowledge of the insureds business and the policy, Section 5, that all contemplate a management of funds belonging to others, didn't it?
> A. That is correct."

In the interest of brevity we will limit our recitation of facts to USAFORM Hail Pool because the story of one of the three groups should enable this Honorable Court to determine whether it ought to hear this case on its merits.

The abbreviation (R.) will refer to the stipulated record certified to this Court by the clerk of the Court of Appeals, Fifth Circuit. Copies of the opinion, judgment, and order denying rehearing and the District Court's final summary judgment have been printed as an appendix hereto.

USAFORM Hail Pool, Inc., the named insured, was incorporated in Florida on November 18, 1961, to act as managing agent for a group of insurance companies under a pooling arrangement whereby the Pool Participants shared the risk of insuring farm crops against hail storm damage (R. 36). As managing agent the corporation's functions included:

(a) collecting premiums belonging to the Pool Participants (R. 38, 60, 177, 184, 186);

(b) depositing these premium monies in a trust account (R. 38);

(c) paying from the trust account crop losses owing to insured farmers, and pool expenses (R. 38);

(d) at the conclusion of each pool year, accounting to the Pool Participants for their respective percentage shares of the balance of the monies remaining in the trust account, and remitting the same to them (R. 38);

(e) during the pool year, it was anticipated that approximately $5,000,000.00 in premiums would be deposited by the Pool Participants (R. 60);

(f) USAFORM Hail Pool's sole source of earnings was its commission of 3% of the total premiums deposited with it during the pool year plus a small override determined at the end of the pool year (R. 38).

Substantially all of the assets in the hands of the corporation consisted of the premium monies which belonged to the Pool Participants.

The sole stockholder and chief executive officer of USAFORM Hail Pool, Inc., was F. Wylly Clarke, Jr. (R. 44, 186). The other officers and directors were Clarke's wife, his personal secretary Barbara Murphy, and other

persons dependent on employment by Clarke for their livelihood (R. 36-40, 76-78).

The auditing controls of the corporation were such that the bonding company admitted that only Clarke could steal any substantial sum of money (R. 180-181).

On June 29, 1959, a blanket position or fidelity bond was issued by Fidelity and Deposit Company of Maryland (herein described as F & D) agreeing to indemnify various named corporate insureds, owned or controlled by F. Wylly Clarke, Jr. (herein described as "Clarke"), against any loss sustained through fraudulent or dishonest acts of their employees (R. 11, 44), Clarke being included as a "Covered" employee under the Bond (R. 43, 44, 181). When USAFORM Hail Pool, Inc., was incorporated, it was added to the list of named insureds. The Bond was for $500,000.00 (R. 11). Since Clarke was the only person who could steal a large sum of money (R. 181), it is obvious that the amount of the Bond was dictated by the need to protect against possible theft of Premium money by Clarke. Indeed, it can be safely assumed that Clarke would not misappropriate what money the named insured corporations owned in their own right, since he was "the sole stockholder and alter ego" of the named insured corporations (R. 5, 6, 186).

The Fidelity Bond contained the so-called "in trust and on commission" clause which was Section 5 of the "conditions and limitations", reading as follows:

> "Section 5. The insured property may be owned by the Insured or held by the Insured in any capacity whether or not the Insured is liable for the loss thereof, or may be property as respects which the Insured is legally liable." (R. 11).

Before depositing their premium money with USAFORM for the 1962 crop year, the Pool Participants sought specific assurances from Clarke that their premium monies deposited with USAFORM would be protected under the Fidelity Bond. Clarke wrote F & D on January 16, 1962, advising that the Pool Participants had requested him to inquire as to whether the Pool Participants were protected against misappropriation of their premium monies deposited with USAFORM Hail Pool, Inc. (R. 59-62, 134). On February 1, 1962, F & D replied, flatly stating that the Pool Participants' monies were protected:

> "It is our opinion that the funds in the 'Premium Account' are covered against loss through any of the acts covered by our bond . . ." (R. 64).

Having given these assurances, F & D's letter concluded:

> "We believe the above interpretation should satisfy the Pool's participants as to a possible loss in the premium account due to dishonesty of Hail Pool's employees." (R. 64-65).

The contents of F & D's letter of February 1, 1962, were passed on to the Pool Participants by Clarke (R. 68-69; 132-134; 140-141) and the assurances given were relied on by them (R. 130-137). After receiving these assurances the Pool Participants delivered their premium monies to the Hail Pool and subsequently, on or about July 1, 1962, the Fidelity Bond was renewed (R. 84-85).

At all times since January 16, 1962, F & D:

(a) knew the method of operation of USAFORM Hail Pool, Inc. (R. 43, 178, 193);

(b) knew Clarke was "the sole stockholder and alter ego" of the named insured (R. 5, 6, 43, 186);

(c) accepted Clarke as a covered employee and charged a premium based on listing him as a covered employee (R. 44, 181, 192);

(d) knew that USAFORM Hail Pool's business operation consisted of handling monies belonging to the Pool Participants (R. 60, 177, 178, 184, 186, 193);

(e) knew that the principal asset in the hands of USAFORM was the premium monies belonging to the Pool Participants (R. 38, 177, 184) which would total about $5,000,000.00 for the year (R. 60);

(f) knew that, by reason of the corporation's auditing procedures, and Clarke's control thereof, he, Clarke, was the only employee who could misappropriate any substantial amount of premium monies belonging to the Pool Participants, and knew, therefore, that a bond of $500,000.00 was taken out only to protect against Clarke's possible defalcation (R. 180-181);[2]

(g) knew that Clarke, the sole stockholder and alter ego of the named insured, wouldn't and couldn't steal from himself and therefore the Pool Participants' premium monies were the only thing he would steal;

(h) knew that Clarke was using the Bond to induce the Pool Participants to deposit their premium monies in the USAFORM premium or trust account (R. 59-66);

(i) knew that the Pool Participants were relying on the Bond to protect them against misappropriation of their premium monies by employees of USAFORM Hail Pool, particularly Clarke (R. 60, 65, 175-176);

2. R. O. Barnett, Plaintiff's Claims Manager, with forty-three years' experience, could give no reason, other than the protection of the Pool Participants for taking out a Fidelity Bond on a sole stockholder (R. 216).

(j) knew *everything* about Clarke's operation except that there was misappropriation. As F & D's underwriter testified:

> "Q. Now, the only thing you didn't know about Clarke's operation was that there was misappropriation, isn't that true?
> A. I would say yes." (R. 193).

F & D's chief underwriter admitted on deposition that the Bond contemplated USAFORM's managing funds belonging to others.

> "Q. Now, actually, to your knowledge, F & D's knowledge of the insured's business and the policy, Section 5, that all contemplate a management of funds belonging to others, didn't it?
> A. That is correct." (R. 186).

On February 18, 1963, USAFORM was placed in receivership by order of the Seventh Judicial Circuit Court, Flagler County, Florida (R. 3). An audit of the books of USAFORM Hail Pool, Inc., disclosed a shortage of premium monies belonging to the Pool Participants in the total amount of $311,624.58 (R. 13, 15-25, 108, 109, 111).[3]

Claims were filed on behalf of the named insured and on behalf of the Pool Participants against F & D for the shortages on the ground that the shortages were attributable to the misappropriation of premium monies by Clarke (R. 13). The claims were denied by the Claims Manager of F & D by letter dated August 20, 1963, on the ground that "F. Wylly Clarke, Jr., was never covered under the

3. An audit of the books of U. S. & Foreign Management, Ltd., disclosed that there was a shortage of $277,308.43 in premium money deposits belonging to insurance companies doing business with U. S. & Foreign Management, Ltd. (R. 115). An audit of the books of USAFORM Pan American, Ltd., disclosed a shortage of premium money deposits in the amount of $42,239.21 (R. 118).

Bond" (R. 87)[4] and on the ground that there was no liability to third parties, to-wit the Pool Participants (R. 89).

F & D filed a complaint for Declaratory Judgment in the District Court, Middle District of Florida, based on diversity of citizenship and amount in controversy, asking the Court to determine that the named insureds did not have any claim under the Fidelity Bond by reason of wrongful acts of Clarke (R. 1-9). The complaint alleged that no one of the named insureds, including USAFORM, could have any possible claim under the Bond, because Clarke was "the sole stockholder and alter ego" of each of the named insureds (R. 6), and that these named insureds had "knowledge" of Clarke's wrongful acts (R. 6).[5]

By stipulation filed July 1, 1964, plaintiff and the original defendants (named insureds) agreed that the American Empire Insurance Co. could intervene in the proceeding as class representative for the Pool Participants claiming loss of their premium monies deposited with USAFORM Hail Pool, Inc. (R. 26-29).[6] Admittedly, the Pool Participants had no "knowledge" of Clarke's wrongful acts (R. 190, 210) and it is undisputed that any recovery on the Bond will belong to them (R. 124-127).

On October 25, 1965, the named insureds, through their receiver, filed their Amended Answer and Counterclaims. The named insureds counterclaimed under the

4. This may be contrasted with the testimony of F & D's chief underwriter on deposition that "No question. Clark is covered under the Bond." (R. 181).

5. Of course, the named insureds would have to have knowledge of Clarke's wrongful acts, since he was their alter ego! (R. 6).

6. Stuyvesant Insurance Company was also permitted to intervene as class representative of the Underwriters Group.

Bond for losses arising from the wrongful acts of Clarke. In addition, in separate counts of the counterclaim, they set forth an independent cause of action in fraud, claiming punitive damages based upon F & D's misrepresentations in purporting to insure against misappropriation by Clarke, collecting a premium for insuring him and then denying liability on the ground that he was the sole stockholder and alter ego of the named insureds, and, therefore, "never covered" under the Bond (R. 92-122). F & D has never made any effort to return the premium charged for covering Clarke (R. 192).

The Pool Participants joined in the Amended Answer and Counterclaims seeking to recover under the Bond the losses of premium monies they had suffered and claiming, in separate counts in fraud, punitive damages by reason of the misrepresentations which had been communicated to them with the knowledge of F & D.[7]

F & D moved for a Partial Summary Judgment seeking to eliminate the Pool Participants from the proceeding as a matter of law and to strike all counterclaims seeking punitive damages, based upon F & D's alleged fraudulent acts.

The depositions of F & D's underwriter (C. F. Messinger) and Claims Manager (R. O. Barnett) were taken (R. 142, 194), affidavits were filed (R. 124-138) and briefs submitted. Thereafter the Motion for Partial Summary Judgment was granted in its entirety (R. 254) and made final by the Court.

The Partial Final Summary Judgment entered by the District Court accomplished the following:

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7. Of course, the counterclaims and the Amended Answer were filed on behalf of the members of the Underwriters Group, etc. See Footnote 1 hereof, and pages 100 through 122 of the Record.

(1) Granted a Summary Final Judgment as to the fraud claims of the named insureds who had a direct contract with F & D by virtue of the Fidelity Bond;

(2) granted a Summary Final Judgment as to the fraud claims of the Pool Participants; and

(3) granted a Summary Final Judgment, holding that, as a matter of law, the Pool Participants were neither real parties in interest under Federal Rule 17(a), nor third party beneficiaries of the insurance contract.

The Circuit Court of Appeals, Judge Wisdom dissenting, determined that "the judgment of the . . . District Court in this cause be, and the same is, hereby affirmed."

A Petition for Rehearing was filed March 6, 1969, and denied April 3, 1969, with Judge Wisdom dissenting once again.

REASONS FOR GRANTING THE WRIT

Judge Wisdom opened his perceptive dissent with these words:

> "F & D denied liability on the bond on the stated ground that 'F. Wylly Clarke, Jr., was never covered'. In the complaint F & D alleged that Clarke was 'the sole stockholder and alter-ego of each of the assured'; that his fraud was therefore attributable to the assureds. This position, basic to the complaint, rendered the bond worthless to the persons for whom it was primarily issued—the owners of the premium money in the pool."

F & D accomplished the above described sleight of hand behind a smokescreen of words which obscured the actual risk intended to be covered by the insurance policy

in question. In the process Rule 17(a), F.R.C.P. is literally turned inside out, money is rejected as a proper subject of bailment, rules concerning third party beneficiaries violated, and causes of action pleaded by the insureds actually named in the bond ignored.

Judge Wisdom, calling on the wisdom of Wigmore, puts "underwriting intent" in proper perspective. Support for economic reality also comes from a surprising source, F & D's own Vice President and General Counsel, E. B. McCahan, who has publicly gone on record emphasizing the importance of searching *beyond* the mere words of the bond to determine exactly what risk was intended to be covered.[8]

The Court of Appeals opinion collides head on with the principles spelled out by this Court in *Home Insurance Company* v. *Baltimore Warehouse Company*, 93 U.S. 527, 23 L.Ed. 868, and *California Insurance Company* v. *Union Compress Company*, 133 U.S. 387, 33 L.Ed. 730, 10 S.Ct. 365, with the decision of Eighth Circuit Court of Appeals in *Aetna Insurance Company* v. *Eisenberg*, 294 F.2d 301 (1961), and with the decisions of the Florida Supreme Court in *Holl* v. *Talcott*, 191 So.2d 40, and *Visingardi* v. *Tirone*, 193 So.2d 601.

1. The judgment of the Court of Appeals is in direct conflict with decisions of the United States Supreme Court which hold that where warehousemen, commission

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8. Mr. E. B. McCahan stated in a paper read before the Section on Insurance Negligence and Compensation Law at the American Bar Association meeting at San Francisco on August 7, 1962:

> "I cannot emphasize too strongly the importance of searching beyond the language of the bond, particularly if litigation involves interpretation of controversial language. Exactly what risk did underwriter and insured intend to cover?"

This language is especially significant in the context of the testimony of F & D's underwriter, Messinger, at pages 181 and 186 of the Record. See also the affidavits at pages 130-137 of the Record.

merchants and other bailees take out insurance policies containing clauses similar in import to Section 5 of the F & D bond, such insurance inures to the benefit of the owners of the goods. Thus, in *Home Insurance Company* v. *Baltimore Warehouse Company,* supra, the policy insured the warehouseman against loss of merchandise of his own or held by him in trust or in which he had an interest or liability. This Court held that merchandise held in trust meant merchandise entrusted to the warehouseman by its customers, and covered the full value of the customers' goods. Said Mr. Justice Strong (at page 543):

> "Such insurance is not unusual, even when not ordered by the owners of goods, and when so made it inures to their benefit."

In *California Insurance Company* v. *Union Compress Company,* supra, in construing a clause of a policy insuring property held by a cotton compress company for processing "in trust or on commission", Mr. Justice Blatchford stated (at page 410):

> "The reasoning of the cases where the bailor was the owner of the goods insured by the bailee applies equally to any person, who, having an insurable interest in property, entrusts it to another; and such bailor can, to the extent of his insurable interest, claim the benefit of insurance effected in his favor by his bailee."

It follows from these decisions that if the insurance inures to the benefit of the owners and the owners can claim the benefit of the insurance to the extent of their interest, the owners are third party beneficiaries entitled to sue directly.

The bailor clause in the insurance contract issued by F & D was broader and more explicit than the "in trust

and on commission" clauses involved in the *Home Insurance Company* and *California Insurance Company* cases cited supra. (It should be noted that the majority opinion below categorized a clause identical to Section 5 of the F & D Bond as an "in trust and on commission" clause, R. 275, 276). Section 5 of the F & D Bond insured any property "held by the insured in any capacity whether or not the insured is legally liable for the loss thereof." The insurance coverage, therefore, was property insurance rather than liability insurance, for F & D agreed to pay in the event of loss of the property irrespective of whether or not the named insured could be called upon legally to make good the loss. Coupled with F & D's admitted knowledge of all the facts and circumstances, knowledge of the substantial amounts deposited with the named insured, knowledge of the Pool Participants' reliance on the protection of the Bond, and knowledge that the Bond was being used by Clarke to induce the Pool Participants to deposit premium monies with his corporation—and F & D's acquiescence therein, it is submitted that the policy inured to the benefit of the Pool Participants. As Messinger, F & D's underwriter testified:

> "Q. Now, actually, to your knowledge, F & D's knowledge of the insureds business and the policy, Section 5, that all contemplate a management of funds belonging to others, didn't it?
> A. That is correct." (R. 186).

Looking at the economic realities, as to Clarke's defalcation, the Pool Participants were the *only* insureds under the Bond. Under the decisions of this Court cited above, the Pool Participants should have a right of direct action and should not be required to proceed derivatively through the named insured—the alter ego of the thief causing the loss.

As stated in 7 Fla.Jur., Contracts, Section 101, page 170:

> "However, a third party may sue on a contract intended for his benefit as well as for the benefit of the formal parties thereto. It is said that where a contract creates a right or imposes a duty in favor of a third person, the law presumes that the parties intended to confer a benefit upon him and furnishes him a remedy. And it is held that the law operates upon the acts of the parties to a contract made for the benefit of a third person, and creates the essential privity between the promisor and the third person necessary to a binding legal obligation, even though the primary purpose of the contracting parties was to benefit themselves."

See also *American Surety Co. of New York* v. *Smith*, Fla. (1930), 100 Fla. 1012,130 So. 440, cited by the majority in its opinion:

> "Where, therefore, it is manifest from the nature or terms of a contract that the formal parties thereto intended its provisions to be for the benefit of a third party, as well as for the benefit of the formal parties themselves, the benefit to such third party being the direct and primary object of the contract, or amongst such objects, such third party may maintain an action on the contract even though he be a stranger to the consideration."

See also Wood on Fire Insurance (2d Ed.), page 669:

> "In such cases the terms 'held in trust' or 'on commission' or kindred terms in a policy to an agent, factor or the like, have been held as giving to the owner of the property the right to take the place of the assured, to adopt the contract, and to enforce it, in his own name * * *".

2. The decision of the Fifth Circuit in this case is also in direct conflict with the decision of the Eighth

Circuit Court in *Aetna Insurance Company* v. *Eisenberg*, 294 F.2d 301. Insurer, which had issued a furriers' customer basic policy, brought an action against the insured for a declaratory judgment to have the policy declared void because of the named insured's alleged fraud in understating the value of furs which his customers had stored at his establishment. The named insured's customers were allowed to intervene, and they filed counterclaims seeking a determination that the insurer was liable under the policy for their furs which had been destroyed in a fire. The insurer appealed an adverse judgment in favor of the customers. The Court of Appeals for the Eighth Circuit held that the policy was a third party beneficiary contract, that the customers were the real parties in interest and, as such, could maintain an action on the policy directly against the insurer, further holding that the insurer was estopped to set up against the insured's customers the defense of fraud it had against the insured. The Court of Appeals said:

> "The rights of the third party beneficiaries here were in no sense based on 'subrogation.' The third parties are true beneficiaries and their rights are direct against Aetna and not dependent on Eisenberg. As the Trial Court correctly held, the owners of the property were the real parties in interest and as such could maintain an action on the policy directly against Aetna. (Citing authority)." (At page 306).

The Fifth Circuit Court of Appeals erroneously distinguished the Eisenberg case in its opinion on the ground that "in Eisenberg the contract specifically gave the customers of the insured the right to sue." The Court was confused because *there were two types of policies* discussed in the Eighth Circuit Court's Eisenberg opinion. In addition to the basic insurance policy referred to above, each customer had the option of obtaining a personal fur

floater policy in which he or she *was the named insured.* Aetna admitted that it was directly liable to the customers who had the personal fur floater policies. There was no provision in the basic policy, which named Eisenberg as the insured, giving customers the right to sue, and Aetna contested the right of the customers to sue on the basic policy because under its specific terms only Eisenberg, the named insured, had a right of direct action.

While there are factual differences between the case at bar and the Eisenberg case, the basic principles are the same. (1) In Eisenberg the insurer pointed out that only Eisenberg was the named insured—a similar claim is being made here. (2) In Eisenberg the insurer knew that Eisenberg was advertising insurance coverage by Aetna —in the case at bar plaintiff expected that the assurances contained in its letter of February 1, 1962, that the Pool Participants' property was protected under the bond, would be relayed to them. (3) In Eisenberg there was reliance by the named insureds' customers—in the case at bar, there was reliance on the Bond by the Pool Participants. (4) Eisenberg involved furs belonging to the customers of the named insured—in the case at bar there were premium monies in a segregated account belonging to the Pool Participants. (5) In both cases the insurer fully understood the "named insured's" business operation. (6) Finally, in both cases, the policies cover more than just the legal obligation of the named insured to third parties. As stated in the District Court opinion in Eisenberg:

> "Another point of difference between the bailee's customer policy and an ordinary third party beneficiary contract is that the policy ordinarily covers more than the legal obligation of the bailee to his bailors; it insures the bailor's interest to the extent of the

policy terms, which are ordinarily more extensive than his rights against the bailee."[9]

The law in the Eighth Circuit is further amplified in *Stillwell Frozen Foods, Inc.* v. *North British and Mercantile Insurance Company*, 184 F.Supp. 629. In Stillwell, the owner of frozen food was permitted to recover directly against the insurance company for loss of food held by a frozen food storage company. The District Court observed at page 633:

> "The fact that the plaintiff was not a party to the contract, that it paid no consideration for the contract, and that there was no agreement between plaintiff and Zero Mountain to maintain insurance for the plaintiff's benefit does not defeat the plaintiff's cause of action as a donee beneficiary."

In our case, the facts are stronger because prior to the loss, F & D had been informed as to the identity of the owners of the premium money.[10]

3. In addition to conflicting with the decisions of this Court and the decision of the Eighth Circuit Court in Eisenberg, supra, the decision below violates principles of general law. It has been a long standing rule that the owner of property insured by commission merchants and warehousemen has the right of direct action.

In *Lewis et al.* v. *Home Insurance Company*, 199 App. Div. 566, 192 N.Y.Supp. 170, the insurer claimed that a New York Statute giving warehousemen the right to sue directly for recovery of customers' property preempted the right of direct action by the owner. The Court, in

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9. *Aetna Insurance Co.* v. *Eisenberg*, 188 F.Supp. 415, 420.

10. Clarke's letter to Henderson, Vice President of F & D (R. 59-61) and Messinger's letter to Clarke (R. 64-66).

sustaining the owner's right of direct action, stated (at page 172):

> "The exact question here to be determined has not been before the courts of this state in recent years. In fact, it seems to have been taken for granted that the real owner of goods destroyed by fire can sue in his own name to recover the loss."

(at page 176):

> "The law having been settled for many years that a warehouseman or commission merchant may sue to recover the entire loss as the trustee of an express trust, under Section 449 of the Code, the Defendant now contends that, because the Courts have so held, therefore, the owner of the goods cannot sue. It seems, however, that the law has always been to the contrary. In Wood on Fire Insurance (2nd Ed.), page 669, the rule is given as follows: 'In such cases the terms "held in trust" or "on commission" or kindred terms in a policy to an agent, factor or the like, have been held as giving to the owner of the property the right to take the place of the assured, to adopt the contract, and to enforce it in his own name or that of his agent.' * * *"
>
> "Commission Dwight in Pitney v. Glens Falls Insurance Co., (1875) 65 N.Y. 6, lays down the rule that —'an action on an insurance policy may be brought either in the name of the party by whom or for whom it is made.'"

In *B. N. Exton & Co.* v. *Home Fire and Marine Insurance Co.*, 249 N.Y. 258, 164 N.E. 43, Miller Tompkins & Co. ordered nineteen rolls of paper from Brown Company, a paper manufacturer. The paper was rejected after delivery and the purchase order was cancelled. Brown Company requested Miller Tompkins & Co. to hold the paper at its place of business pending instructions.

The paper was on the premises of Miller Tompkins & Co. when destroyed by fire. Defendant insurance company had insured Miller Tompkins & Co. against loss by fire including the "property of the assured where held in trust or on commission, also the property of others for which the assured may be or agree to become liable in case of loss or damage by fire." Defendant insurer refused to pay the loss.

The Court held that the property of Brown Company was protected under the policy and that Brown Company had the right to sue the insurance company directly. Said the Court (at page 44):

> "We are of the opinion that the policies in this case cover the Brown Company's paper. It was property 'held in trust' by the Miller Tompkins & Co., for the Brown Company, within the meaning which has been given to these words in the insurance business and insurance law."
>
> "The words 'in trust' may with entire propriety be applied to any case of bailment, where goods belonging to one person are entrusted to the custody or care of another and for which the bailee is responsible to the owner. *Stillwell* v. *Staples*, 19 N.Y. 401."
>
> "The phrases describing property 'as held in trust' or 'on commission' and kindred terms, in a policy to an agent, factor, or the like, have been held as giving to the owner of the property a right to take the place of the insured, to adopt the contract, and to enforce it in his own name or that of his agent."

In *Globe & Rutgers Fire Insurance Co.* v. *United States*, (5th CCA, 1953) 202 F.2d 696, the United States Government brought suit against six insurance companies for loss by fire of cotton seeds belonging to the Commodity Credit Corporation in the custody of a cotton gin

company, the named insured, under the insurance policies. Each of the insurance policies provided:

> "* * * this policy shall also cover property sold but not delivered, held in trust or on consignment or for storage."

The Court of Appeals for the Fifth Circuit in that case said (at page 696):

> "Thus the question upon which decision must rest is whether the policy provision quoted furnished insurance protection to the United States against loss of the cotton seed by fire, or covered only the legal liability, if any, of the gin company resulting from such loss."

The Court held that the United States could proceed by direct action, answering the question it posed in the affirmative.

The Court below distinguished the Globe Insurance case by differentiating between fidelity bonds, which it held to be indemnity insurance, and fire insurance which it considered to be property insurance. Said the Court of fidelity bonds:

> "The insurers liability does not arise until the insured has suffered a proven loss. * * * The insurance is not on property but on loss of property." (R. 275).

This alleged distinction is discussed in our Petition for Rehearing, which pointed out that property insurance, such as fire insurance *is* indemnity insurance and the insurer's liability also does not arise until the insured has suffered a proven loss (R. 290-294). Further, as we have pointed out above, Section 5 of the bond covers losses of property belonging to others whether or not the named insured is legally liable for the loss.

In *United States Fidelity & Guaranty Company* v. *Slifkin,* (U.S. D.C. N.D. Ala., 1961) 200 F.Supp. 563, the policy clause was substantially identical with Section 5 of Plaintiff's bond, quoted above:

SLIFKIN POLICY:	USAFORM POLICY:
"The money, securities and other insured property (except the premises) may be owned by the Insured or held by him *in any capacity whether or not the Insured is liable for the loss thereof.*" (200 F.Supp. 563, 574).	"Section 5. The insured property may be owned by the Insured, or held by the Insured *in any capacity whether or not the Insured is liable for the loss thereof,* or may be property as respects which the Insured is legally liable." (R. 11).

The Court, in construing the Slifkin Clause, stated (at page 574):

> "Generally, such a clause is held to insure the bailor's insurable interest under a third party beneficiary theory, it being necessary only that there be an expression in the bailee's policy of an intent to insure the bailor's interest. * * * The express language of this clause gives to the bailor a right to be idemnified under the bailee's policy irrespective of the bailee's legal liability for the loss."

As the Slifkin case points out, Section 5 of the F & D Bond is the expression of F & D's intent that the Pool Participants are intended to be insured and are, therefore, the third party beneficiaries. This is reiterated and amplified by the testimony of F & D's chief underwriter:

> "Q. Now, actually, to your knowledge, F & D's knowledge of the insureds business and the policy, Section 5, that all contemplate a management of funds belonging to others, didn't it?
> A. That is correct." (R. 186).

The Court below distinguished the Slifkin case on the ground that the above quoted clause was an "in trust and on commission" clause. However, as can easily be seen, the so-called "in trust and on commission" clause in the Slifkin case is practically identical with Section 5 of the F & D Bond. Actually, the only factual difference is that (a) the thief in the Slifkin case was an outsider and ours was an employee, and (b) Slifkin involved the theft of jewelry whereas our case involved the theft of money. Money is property and a proper subject for bailment. 8 Am.Jur. (2d), Bailment, Sec. 4, p. 907 (R. 294): To put the proposition in Mr. Justice Blatchford's words in *California Insurance Company* v. *Union Compress,* supra:

> "The reasoning of the cases where the bailor was the owner of the goods insured by the bailee applies equally to any person, who, having an insurable interest in the property entrusts it to another . . ."

See also *Richartz* v. *Martin,* 252 Wisc. 108, 31 N.W.2d 158 (owner of loaned truck permitted to recover directly against insurance company even though not named nor interest referred to in policy). *Miller National Insurance Company* v. *Bunds,* 158 Kan. 662, 149 P.2d 350 (owner of stored grain covered by insurance issued to warehousemen was real party in interest entitled to bring action against insurance company). *General Insurance Co. of America* v. *Goldstein,* 45 N.Y.S.2d 570 (each of customers of dry cleaning establishment had direct cause of action for fire loss against insurance company); 8 Am.Jur. 2d, "Bailments", Section 287, p. 1175:

> "Where the bailee has contracted for insurance on the bailed goods, the authorities generally support the rule that as the real party in interest, or the party beneficially entitled thereto, the bailor may

maintain an action directly against the insurer for the proceeds of the policies which cover the goods 'on account of whom it may concern' or by 'trust and commission' or similar clauses."

4. This Honorable Court has granted certiorari in cases where the Federal Rules of Civil Procedure were involved. Certiorari was granted to review the problem of the construction and validity of Rule 35, Federal Rules of Civil Procedure, 28 U.S.C.A., relating to physical and mental examination of parties to actions. *Schlagenhauf* v. *Holder*, Ind. 1964, 85 S.Ct. 234, 379 U.S. 104, 13 L.Ed.2d 152. In *U. S.* v. *Aetna Insurance and Casualty Company*, 338 U.S. 366, 70 S.Ct. 207, 94 L.Ed. 171, this Court, considered on certiorari Rule 17(a) of the Federal Rules of Civil Procedure concerning the right of the real party in interest to sue in its own name.

Rule 17(a) provides in pertinent part that every action shall be prosecuted in the name of the real party in interest but a party in whose name a contract has been made for the benefit of another *may* sue in his own name without joining with him the party for whose benefit the action is brought. F & D has succeeded in turning Rule 17(a) inside out so that the real parties in interest, the Pool Participants, have not been allowed by the Courts below to maintain this suit although the insurance proceeds recovered in the suit will go to them.

The rule has always been, as stated in 6 Cyclopedia of Federal Procedure (3rd Ed.—1966 Rev.), Section 21.25, page 374:

"Generally speaking, the party who will ultimately receive the proceeds of any recovery in an action on an insurance policy is the real party in interest and may maintain action in his own name."

This has been the law since *Daniels* v. *Citizens Insurance Company*, 5 Fed. 425 (Circuit Court D. Ind. 1881), where the Court allowed the plaintiff, who was not the named insured, to sue directly on the policy, saying at page 427:

> "In short, the insurance company knew everything that was material to the risk, and that it was the purpose of this arrangement to insure the property, not of Hudson & Bro., but of the plaintiff."

The quoted language of *Daniels* v. *Citizens Insurance Company* applies to the case at bar. The above quote might read as follows:

> "In short, the insurance company knew everything that was material to the risk, and that it was the purpose of this arrangement to insure the property, not of USAFORM HAIL POOL, INC., but of the POOL PARTICIPANTS."

5. The Federal District Court entered a Final Summary Judgment (R. 254) which included a Final Summary Judgment as to Counts V, X, and XI of the Counterclaim which were separate and distinct actions in fraud and deceit on behalf of the named insureds, who had a *direct contractual relationship* with F & D under the Fidelity Bond.

The Court of Appeals determined that the sole issue to be resolved on appeal was whether the Pool Participants and the Underwriters Group were third party beneficiaries of the Bond.[11] The majority said the Bond could not be extended to the intervenors (Pool Participants and

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11. The Court said:

"The sole issue to be resolved in this appeal is whether or not the intervenors are third party beneficiaries of the Bond. . . ." (R. 268).

underwriters) under the "terms of the contract" and concluded:

> "We therefore do not reach the question of punitive damages. . . ." (R. 277).

In expressly affirming the District Court's judgment in its entirety (R. 283) the Court of Appeals overlooked[12] the fact that Counts V, X, and XI of the Counterclaim were separate and distinct actions in fraud and deceit by the *named insureds*, who had a direct contractual relationship with F & D. "Third party beneficiary" had nothing to do with the claims made by the several *named insureds*.

In expressly failing to consider the named insureds' causes of action sounding in fraud and deceit, the Court of Appeals has effectively denied the named insureds their Constitutional right of appeal to that tribunal.

It is respectfully submitted that the foregoing calls for issuance of a Writ of Certiorari. As this Court stated in *Forsyth* v. *City of Hammond*, 166 U.S. 506, 17 S.Ct. 665, 41 L.Ed. 1095 (at p. 669):

> "We reaffirm in this case the propositions heretofore announced, to-wit, that the power of this Court in

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12. The second question in the appellants' Brief on appeal specifically raised this question and was based on the second specification of error which read:

> "2. The court erred in finding as a matter of law that each of the counterclaimants had no claim against the plaintiff-insurer insofar as each claimed punitive damages and directing the entry of a Final Summary Judgment dismissing Counts IV, V, X, XI, and XII of the Counterclaim."

Counts IV and XII of the Counterclaim are the Counts which deal with the intervenors' (Pool Participants and underwriters) claims of fraud and deceit. It would appear that the Court of Appeals concluded that intervenors' fraud claims depended on privity of contract or status as a "third party beneficiary". F & D cannot escape the consequences of its fraud on the intervenors simply because there was no formal contractual relationship between intervenors and F & D. Fraud and deceit is an *independent tort* not dependent on contractual relationship. No privity of contract is required (R. 287-290).

certiorari extends to every case pending in the Circuit Courts of Appeal, and may be exercised at any time during such pendency, provided the case is one which but for this provision of the Statutes would be finally determined in that Court. And further . . . this power is co-extensive with all possible necessities and sufficient to secure to this Court a final control over the litigation in all the Courts of Appeal. . . ."

6. The Summary Final Judgment is in conflict with decisions of the Supreme Court of Florida which forbid granting a summary judgment where there remains any possible issue of material fact and requires that all inferences of fact from the proof proffered be drawn against the movant and in favor of the party opposing the motion. *Holl* v. *Talcott,* (Fla.) 191 So.2d 40, *Visingardi* v. *Tirone,* (Fla.) 193 So.2d 601, *Leaks* v. *Adeimy,* (Fla.) 195 So.2d 47, 48. This justifies issuance of a Writ of Certiorari under Supreme Court Rule 19(b) and *Forsyth* v. *City of Hammond,* supra.

It is respectfully submitted that it is understating your Petitioners' case to say that the facts support a reasonable inference that the Pool Participants were third party beneficiaries, or, at least, real parties in interest. The undisputed facts show:

(a) that the policy specifically insured property of others held by the named insured "whether legally liable therefor or not";

(b) that the policy contemplated the management of the Pool Participants' property by the named insured;

(c) that the insurer knew all the facts;

(d) that the Pool Participants were relying on the Bond—and the insurer knew it;

(e) that the proceeds of any recovery will belong to the Pool Participants.

It is also submitted that the undisputed facts in the Record support inferences of fraudulent conduct on the part of the insurer.[13]

(a) The letter rejecting the claim said "Clarke was never covered under the Bond" (R. 87). Reading this letter in conjunction with Paragraphs 10 and 12 of the Complaint (R. 5, 6) and Messinger's testimony (R. 142-194), one concludes that F & D refused to pay the claims because Clarke was the sole stockholder of the assureds. Yet F & D had known Clarke was the sole stockholder of the assureds (R. 5, 6, 178, 186, 193), and collected a premium for insuring against theft by Clarke (R. 44, 181). All this creates at least an inference that F & D took money for coverage it did not intend to give. F & D even took the position that the Bond had never taken effect as to anyone! (R. 191). F & D never returned any of the premium (R. 191), not even that attributable to Clarke's coverage (R. 192). If Clarke was never covered because he was the sole stockholder, which is what the letter of rejection and complaint say, F & D knew it from the beginning, and was guilty of fraud from the inception of the contract because it collected and retained a premium for coverage it never intended to give.

(b) Read the aforesaid letter of rejection in conjunction with Paragraphs 11 and 12 of the Complaint (R. 6, 7) and F & D is saying that Clarke was never covered (R. 87) because he was guilty of theft prior to issuance of the Bond (R. 6).[14] However, R. O. Barnett,

13. *Smith* v. *Richards*, 13 Pet. 26, 10 L.Ed. 42.

14. This is a claim that the bond never took effect as to anyone (R. 191, 192). However, even Mr. Messinger admits "that if we contend the bond never took effect, there should have been

F & D's claim manager, stated on deposition that he did not believe Clarke guilty of acts of dishonesty at any time (R. 208).[15] All this raises an inference that Barnett was rejecting the claim because Clarke was never covered by reason of his, Clarke's, prior dishonesty, which reason Barnett did not believe (R. 208). This, if true, would be fraud in the adjustment of the claim, a violation of Fla. Stat. § 626.0605.

CONCLUSION

This tribunal over the past two decades has been required to deal with a multitude of problems created by conflict between the individual and the institutions of our society.

Insurance is one of our mammoth industries and the general public has a large stake in it. We respectfully submit that the opinion of the majority of the Court of Appeals is a step backward in insurance law and the protection of the general public. The implications of the decision extend far beyond the fact situation presented and must be related to money management in general. The principles involved herein apply equally to deposits of money and securities with stock brokers, real estate investment companies, title companies, and even banks.

If sophisticated insurance company executives can be misled by assurances such as were given here, how simple to seduce the trusting general public in situations where they are assured that their bailee is "bonded" for the protection of their property.

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a return premium . . . of $1,810.98" (R. 132). He admits that no premium was returned (R. 191, 192). In retaining the premium, F & D has made its election. *Commercial Ins. Co.* v. *Burnquist*, (1952) 105 F.Supp. 920.

15. Compare the Rossiter report (R. 253).

In personal injury litigation insurance carriers are gradually learning that the growing awareness of the worth of the individual makes it good business to settle claims fairly and avoid the possibility of a high verdict for "pain and suffering." The trend has been aided by an able plaintiffs' bar.

In Fidelity Bond cases claimants have been at a terrible disadvantage. It is a highly technical field awash in "fine print" and the competent lawyers are representing the bonding companies, not the claimants. The insurer's exposure is usually limited to a definite amount stated in the bond and there is no risk of a "pain and suffering" verdict. In short, there is little motivation for fair settlement of claims other than that of restless conscience. There is a real need to require a standard of fair dealing between the insurer and the insured in situations such as we present to the Court in this case.

For all the reasons stated above, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioners

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE MIDDLE DISTRICT OF FLORIDA. JACKSONVILLE DIVISION

No. 63-186-CIVIL-J

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Maryland corporation,
Plaintiff,

vs.

USAFORM HAIL POOL, INC., et al.,
Defendants,

AMERICAN EMPIRE INSURANCE COMPANY OF SOUTH DAKOTA, et al.,
Intervenor-Defendants.

FINAL SUMMARY JUDGMENT

The above entitled cause came on before the Court on the Motion for Summary Judgment by the plaintiff, Fidelity and Deposit Company of Maryland.

Harry T. Gray of the firm of Marks, Gray, Yates, Conroy & Gibbs appeared on behalf of the plaintiff. W. Warren Cole, Jr. and David K. Sigerson of the firm of Black, Cobb, Cole & Crotty appeared on behalf of all of the defendants and all of the intervenor defendants, above named, in the title of the cause. The Motion for Summary Judgment by Fidelity and Deposit sought such summary judgment as a matter of law against each of the counterclaimants insofar as each claimed punitive damages against the Fidelity and Deposit and a summary judgment as a matter of law against each of the counterclaimants who were not named as insureds in the bond issued by it (A copy at-

tached to the complaint as Exhibit "A") but asserted claims against the Fidelity and Deposit under said bond as entitled to recover thereunder and claims against the Fidelity and Deposit as third party beneficiaries for whom it was asserted said bond was issued to protect.

As to USAFORM Pan-American, Ltd. it was stipulated that it is a named insured under the bond, Exhibit "A", and its status in the cause is that of a defendant.

The Court finds that the pleadings, depositions and affidavits on file show that there is no genuine issue as to any material fact that in law would permit the recovery of punitive damages under any one of the counterclaim counts against the Fidelity and Deposit Company and that it, as the plaintiff, is entitled to judgment as a matter of law insofar as each of said counterclaim counts seeks to recover punitive damages from the Fidelity and Deposit Company.

The Court further finds from the pleadings, depositions and affidavits on file that there is no genuine issue as to any material fact that would sustain the right of any one of the intervenors, American Empire Insurance Company of South Dakota, Stuyvesant Insurance Company or the underwriters or pool participants, that by intervention they are stipulated to represent, to recover under the bond, Exhibit "A", either as a named insured or as a third party beneficiary protected by the bond, although not named therein as an insured.

The Court further finds that the plaintiff, Fidelity and Deposit Company of Maryland is entitled to a Summary Judgment as a matter of law and it is, therefore,

ORDERED, ADJUDGED and DECREED that the plaintiff's Motion for Summary Judgment be and the same hereby is granted and that the counterclaimant, American Empire Insurance Company of South Dakota as inter-

venor have and recover nothing by its claim asserted in the Count I of the counterclaim and that the plaintiff as to said Count and said intervenor, go hence without day.

The Court further finds that the plaintiff, Fidelity and Deposit Company of Maryland is entitled to a Summary Judgment as a matter of law and it is, therefore,

ORDERED, ADJUDGED and DECREED that the plaintiff's Motion for Summary Judgment be and the same hereby is granted and that the counterclaimant, American Empire Insurance Company of South Dakota, acting on behalf of pool participants, have and recover nothing by its claim asserted in the Count III of the counterclaim and that the plaintiff as to said Count and said intervenor, go hence without day.

The Court further finds that the plaintiff, Fidelity and Deposit Company of Maryland is entitled to a Summary Judgment as a matter of law and it is, further

ORDERED, ADJUDGED and DECREED that the plaintiff's Motion for Summary Judgment be and the same hereby is granted and that the counterclaimant, American Empire Insurance Company of South Dakota, acting on behalf of pool participants, have and recover nothing by its claim asserted in the Count IV of the counterclaim and that the plaintiff as to said Count and said intervenor, go hence without day.

The Court further finds that the plaintiff, Fidelity and Deposit Company of Maryland is entitled to a Summary Judgment as a matter of law and it is further

ORDERED, ADJUDGED and DECREED that the plaintiff's Motion for Summary Judgment be and it is hereby granted and that the defendant, USAFORM Hail Pool, Inc. or its receiver, have and recover nothing by its claim asserted in the Count V of the counterclaim for exemplary

or punitive damages in the amount of $934,873.74 and that the plaintiff as to said claim for punitive damages by the defendant or its receiver, go hence without day.

The Court further finds that the plaintiff, Fidelity and Deposit Company of Maryland is entitled to a Summary Judgment as a matter of law and it is further

ORDERED, ADJUDGED and DECREED that the plaintiff's Motion for Summary Judgment be and the same hereby is granted and that the counterclaimant, Stuyvesant Insurance Company, acting on behalf of itself and the underwriters group for which it intervenes, have and recover nothing by its claim asserted in the Count VII of the counterclaim and that the plaintiff as to said Count and intervenor, go hence without day.

The Court further finds that the plaintiff, Fidelity and Deposit Company of Maryland is entitled to a Summary Judgment as a matter of law and it is further

ORDERED, ADJUDGED and DECREED that the plaintiff's Motion for Summary Judgment be and the same hereby is granted and that the counterclaimant, Stuyvesant Insurance Company, acting on behalf of itself and the underwriters group for which it intervenes, have and recover nothing by its claim asserted in the Count IX of the counterclaim and that the plaintiff as to said Count and intervenor, go hence without day.

The Court further finds that the plaintiff, Fidelity and Deposit Company of Maryland is entitled to a Summary Judgment as a matter of law and it is further

ORDERED, ADJUDGED and DECREED that the plaintiff's Motion for Summary Judgment be and the same hereby is granted and that the counterclaimant, U. S. & FOREIGN MANAGEMENT, LTD. or its receiver, have and recover nothing by its claim asserted in the Count

X of the counterclaim for exemplary or punitive damages in the amount of $831,925.29 and that the plaintiff as to said claim and said defendant or its receiver, go hence without day.

The Court further finds that the plaintiff, Fidelity and Deposit Company of Maryland is entitled to a Summary Judgment as a matter of law and it is further

ORDERED, ADJUDGED and DECREED that the plaintiff's Motion for Summary Judgment be and the same hereby is granted and that the counterclaimant, USAFORM Pan-American, Ltd., have and recover nothing by its claim asserted in the Count XI of the counterclaim for exemplary or punitive damages in the amount of $126,717.63, and that the plaintiff as to said claim of said intervenor, go hence without day.

The Court further finds that the plaintiff, Fidelity and Deposit Company of Maryland is entitled to a Summary Judgment as a matter of law and it is further

ORDERED, ADJUDGED and DECREED that the plaintiff's Motion for Summary Judgment be and the same hereby is granted and that the counterclaimant, Stuyvesant Insurance Company, acting on behalf of itself and the underwriting group for which it intervenes, have and recover nothing by its claim asserted in the Count XII of the counterclaim and that the plaintiff as to said Count and Intervenor, go hence without day, and it is further

ORDERED, ADJUDGED and DECREED that the Clerk of this Court enter a Final Judgment upon the Summary Judgment herein dismissing Counts I, III, IV, V, VII, IX, X, XI and XII of the Defendants' and Intervenor-Defendants' Amended Answer and Counterclaim, and the undersigned expressly determines that there is no just reason for delay in the entry of Final Judgment on this Order.

DONE AND ORDERED in Jacksonville, Duval County, Florida, this 14 day of November, A. D. 1966.

/s/ Wm. A. McRae, Jr.
Judge United States District Court

Copies to Counsel of record.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 24385

AMERICAN EMPIRE INSURANCE COMPANY OF SOUTH DAKOTA, ET AL,

Appellants,

vs.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

Appellee.

Appeal from the United States District Court for the Middle District of Florida

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(March 6, 1969)

Before JONES, WISDOM and DYER, Circuit Judges.

DYER, Circuit Judge. Fidelity and Deposit (F & D) sought a declaratory judgment to have its liability determined on a fidelity bond issued by it to certain named insureds as defendants. To avoid a multiplicity of suits in various courts, it was stipulated that certain parties claiming to have interests protected by the bond be per-

mitted to intervene.[1] The District Court rendered summary judgment against the intervenors on their claims and their counterclaims, holding that they were neither named insureds in, nor third party beneficiaries of the bond. This appeal followed. We affirm.

The facts are undisputed. The fidelity bond issued by F & D provided for the indemnification of the four corporate named insureds for any losses caused by "fraudulent or dishonest" acts of their employees. The defendant corporations operated as brokers or clearing-houses for insurance companies but sold no insurance of their own. Hail Pool managed a pool created by certain insurance companies to cover hail damage to crops owned by farmers who were insureds of these companies. Hail Pool collected the premiums for these companies and paid any losses suffered by the companies' insureds. At the end of the year any excess was remitted to the participants of the pool. Foreign Management and Pan American acted as intermediaries between insurance companies and reinsurance companies. They transmitted reinsurance premiums from the reinsured company to the reinsurer and remitted return premiums from the reinsurer to the reinsured. The named insureds had the following in common: F. Wylly Clarke was the Chief executive officer and controlled each corporation; each corporation was a named insured in the fidelity bond issued by F & D;

1. The defendants named in the complaint (and who were named as insureds in the fidelity bond issued by F & D) were: USAFORM Pan-American, Ltd. (Pan-American); USAFORM Hail Pool, Inc. (Hail Pool); U.S. & Foreign Management, Inc. and U.S. & Foreign Management, Ltd. (Foreign Management); and Barbara B. Murphy, as Receiver for the latter three corporations. The intervenors (who were not named in the bond) were: American Empire Insurance Company of South Dakota, on behalf of itself and all other insurance companies who were shareholders in the USAFORM Hail Pool; Stuyvesant Insurance Company, on behalf of itself and all other insurance companies who employed U.S. & Foreign Management, Ltd., and USAFORM Pan-American Ltd.

each corporation was in possession of premium monies belonging to insurance companies; and each corporation was found to have substantial shortages in its premium accounts.[2]

The claims made on the bond by the named insureds attributed the shortages to the dishonesty of Clarke acting alone and/or in collusion with others. F & D disclaimed liability under the bond. The plaintiff and the defendants stipulated that American Empire Insurance Company could intervene as the class representative for the Pool Participants who were claiming loss of their premium monies held by Hail Pool and that Stuyvesant Insurance Company could intervene as the class representative for the underwriters who were claiming loss of reinsurance premiums and return premiums entrusted to Foreign Management and Pan American. In addition to seeking recovery on the bond the intervenors counterclaimed for punitive damages, alleging that F & D fraudulently refused to acknowledge its liability under the bond to the named insureds. The District Court granted a partial summary judgment finding that ". . . there is no genuine issue as to any material fact that would sustain the right of any one of the intervenors . . . to recover under the bond . . . either as a named insured or as a third party beneficiary protected by the bond . . ." The District Court likewise denied the intervenor's counterclaim for punitive damages.

---

2. On February 18, 1963, Hail Pool was placed in receivership by order of the Seventh Judicial Circuit Court, Flagler County, Florida. An audit of the books of Hail Pool disclosed a shortage of premium monies belonging to pool participants in the amount of $311,624.58. The same court placed Foreign Management in receivership on the same date. An audit of the books of Foreign Management disclosed a shortage of $277,308.43 in premium monies belonging to insurance companies doing business with it. An audit of the books of Pan American disclosed a shortage of premium money deposits in the amount of $42,239.21.

The sole issue to be resolved in this appeal is whether or not the intervenors are third party beneficiaries of the bond, as they insist. To support this, intervenors urge that it was the underwriting intent of F & D that the intervenors were to be beneficiaries of the bond. This must be concluded, the intervenors say, because of (1) the probable lack of liability of F & D to the named insureds; (2) correspondence exchanged between F & D and the named insureds' president Clarke, and (3) the terms of the bond itself.

Intervenors' attempt to prognosticate the outcome of a trial on the merits of F & D's liability to the named insureds in the bond gives us little pause. F & D's liability vel non has not been decided by the District Court and is not now before this Court. Whether the underwriter may or may not have a defense against its named insureds is not relevant in considering F & D's liability to the Pool Participants as third party beneficiaries of the bond.

The exchange of correspondence between Clarke and F & D, the intervenors argue, furnishes evidence of the underwriting intent to protect the intervenors. On January 16, 1962, Clarke wrote F & D as follows:

> In setting up USAFORM Hail Pool, Inc. we will maintain two bank accounts; one a premium account, and the other a general account. Management fees and overwriting commissions will be deducted from premiums and put in the general account which belongs solely to Hail Pool. The premium account belongs to the Pool Companies; however, from this account will be paid losses and loss adjustment expenses incurred, and recognized Pool expenses.
>
> Several of the Pool Companies have approached us and asked if our fidelity bond could be extended to protect them in case of loss in the premium account

due to dishonesty of Hail Pool's employees. I am wondering if this is not now covered under the bond as follows:

"Ownership of Money or Other Property

"Section 5. The Insured property may be owned by the Insured or held by the Insured in any capacity whether or not the Insured is liable for the loss thereof, or may be property as respects which the Insured is legally liable."

I really don't know how to interpret the above unless the Pool participants were named as assureds under the bond. Would this be possible? If they are not named, does our bond protect the companies against loss on the funds in the premium account?

In reply, the Vice President of F & D wrote Clarke:

I have discussed with Mr. Henderson and our executives at our Home Office, your question as to the extent of cover of the "Ownership of Money or Other Property Clause" as appearing in the bond. It is our opinion that the funds in the "Premium Account" are covered against loss through any of the acts covered by our bond caused by employees of our USAFORM as defined therein.

The premiums in the "Premium Account", although they may belong to the Pool members, constitute money "belonging to USAFORM", or in which Hail Pool has a pecuniary interest, or for which the corporate entity is legally liable, or held by the Corp., in any capacity whether legally liable therefor or not.

We cannot extend the bond to the Pool's participants since they do not qualify as "joint insureds". Our liability is confined to USAFORM Hail Pool, Inc., and we cover only the losses which it may sustain through acts covered by the bond. If funds in the "Premium Account" are embezzled by the employees of Hail Pool, therefore, we would reimburse the Corp. for such funds either as property held by USAFORM in

> any capacity as respects which it is legally liable to others, viz, the Pool's participants. In other words such property is covered by the bond but not directly in favor of the Pool's participants.
>
> The Pool's participants are not eligible to be Joint Insureds under the bond under our rules because to include them as such would make the bond liable for the acts of their employees, in addition to the acts of USAFORM'S employees.
>
> We believe the above interpretation should satisfy the Pool's participants as to a possible loss in the "premium account" due to dishonesty of Hail Pool's employees.

Thereafter Clarke wrote one of the Pool Participants:

> While we cannot arrange with Fidelity and Deposit to extend coverage to the pool companies as "joint insureds", it is true that we are covered against losses which may be sustained through acts covered by the Commercial Blanket Bond. This, in turn, means that the pool companies would be protected.

If the correspondence may be considered as evidence of underwriting intent, about which we have grave doubts because the bond's language is clear and unambiguous, we read the letters to say no more than that the Pool Participants could be indirectly benefited by the bond since an *insured* loss of the Premium Account funds would be covered and Hail Pool would then be paid under the terms of the bond. To include the Pool Participants within the coverage of the bond would result in the inclusion of their employees. It is obvious that such was not the intent of the parties.

Going one step further the intervenors argue that the correspondence is not just evidence of underwriting intent, it is a constituent part of the bond. This is both novel and unsound. There was no correspondence by F & D with the Pool Participants. The Pool Participants were never

named as additional insureds. F & D refused to name any of them in its fidelity bond. None of the Pool Participants paid any premium to F & D for protection under the bond or applied to F & D directly for fidelity insurance on the Pool operations. *Buxton* v. *International Indemnity Company*, 1920, 47 Cal. App. 583, 191 P. 84, and *Aetna Insurance Company* v. *Eisenberg*, 8 Cir. 1961, 294 F.2d 301, relied on by intervenors are inapposite. In *Buxton* the court held that a letter agreement preceding the issuance of a policy, that the policy would cover certain risks, became a part of the insurance contract subsequently issued. Here F & D never recognized the right of any Pool Participant, nor did F & D ever send a letter to a Pool Participant giving any interpretation of the bond, or indicating that its coverage extended to anyone other than the named insureds. In *Eisenberg* the contract specifically gave the customers of the insured the right to sue.

Pointing to Section 5 of the conditions and limitations of the bond, "The insured's property may be owned by the insured, or held by the insured in any capacity whether or not the insured is liable for the loss thereof, or may be property as respects which the insured is legally liable," the intervenors urge that this protects third parties whether the named insureds are legally liable or not and where the contracting parties intend to confer a benefit on a third party, the third party has a direct action to enforce it. It is true that any losses suffered by the named insureds, whether or not the insureds were liable for the loss thereof, are covered. This would cover losses of funds held by a named insured which it may or may not owe to the Pool Participants. Legal liability of the named insured to a third party does not however create a legal liability of F & D to third parties under the bond. The claims of the third party Pool Participants are not against F & D but against the named insureds or their Receiver for

failure to account to the Pool Participants. Since contracting parties are presumed to act for themselves, such an intent to benefit should be clearly expressed in the contract. In *American Surety Co. of New York* v. *Smith*, Fla. 1930, 100 Fla. 1012, 130 So. 440, Judge Strum, then a Justice of the Supreme Court of Florida and later a judge of this Court stated:

> Where, therefore, it is manifest from the nature or terms of a contract that the formal parties thereto intended its provisions to be for the benefit of a third party, as well as for the benefit of the formal parties themselves, the benefit to such third party being the direct and primary object of the contract, or amongst such objects, such third party may maintain an action on the contract even though he be a stranger to the consideration.

Id. at 441.

It would seem that it is not manifest from the nature of a fidelity bond that uninsured parties should be allowed to recover. Rather, in the case *sub judice*, Judge Strum's further comment is more apropos:

> When a contract is designed solely for the benefit of the formal parties thereto, third persons cannot maintain an action thereon, even though such third persons might derive some incidental or consequential benefit from its enforcement. *Leon* v. *Kerrison*, 47 Fla. 178, 36 So. 173; *Wright* v. *Terry*, 23 Fla. 160, 2 So. 6.

Id. at 441. *See also* 7 Fla. Juris. 169, Contracts Section 101; *First National Bank of St. Augustine, et al.* v. *Perkins*, Fla. 1921, 81 Fla. 341, 87 So. 912; *Punta Gorda Bank* v. *State Bank of Ft. Meade*, Fla. 1907, 52 Fla. 399, 42 So. 846.

In an effort to put a more equitable gloss on the Pool Participants as third party beneficiaries the intervenors take the position that if the bond was not written for their

benefit there is no reason for the bond because Clarke was the alter-ego of the defendant corporations and his dishonesty forecloses any liability of F & D. Clarke, however, was only one of the employees covered by the bond. Moreover, F & D denied liability because other officers of Hail Pool knew of Clarke's dishonesty. The mere fact that Clarke may be the alter-ego of the defendant corporations does not eliminate F & D's liability. There is no doubt that Clarke was covered by the bond.

Intervenors rely upon property insurance, warehousemen's liability, and bailor-bailee cases in an attempt to analogize them with their asserted third party beneficiary claims here. But a distinction must be drawn between indemnity and property insurance. The fidelity bond was an indemnity insurance contract. The insurer's liability does not arise until the insured has suffered a proven loss. It is in the nature of a personal insurance contract. The insurance is not on property but is for loss of property. This distinguishes *Globe and Rutgers Fire Ins. Co., et al.* v. *U. S.*, 5 Cir. 1953, 202 F.2d 696, urged upon us by the intervenors, which involved a policy insuring property against loss by fire. Hail Pool's policy insured only losses resulting from a breach of duty by an employee.

The distinction between insurance on property and on loss of property also applies to the warehousemen cases and the bailee cases. Moreover, in *Aetna Insurance Co.* v. *Eisenberg, supra,* relied on by intervenors, where the insurer had issued a furrier's customer basic policy, the contract gave the customers the right to sue. *United States Fidelity and Guaranty Co.* v. *Slifkin,* N.D. Ala. 1961, 200 F. Supp. 563, involved coverage of consigned jewelry which was stolen from the bailee. The contract had an "in-trust-and-on-commission" clause which is common in bailee insurance contracts and under which bailors generally are allowed to sue under a third party beneficiary statute. But

here again, this clause is interpreted to insure a bailor's insurable interest in property, and this is so irrespective of the bailee's legal liability for loss.

Finally, intervenors' reliance on *New Amsterdam Casualty* v. *Felder*, 5 Cir. 1954, 214 F.2d 825, is misplaced. The court there simply held that a named insured was not prevented from suing even though he was not the first named insured in the policy.

We are of the firm view that F & D's contract meant just exactly what it clearly said, that is, that it insured the named corporations and those corporations only, against the defalcations of their employees. We can find no support for the intervenors' contention that the District Court should re-write the contract. The rule was succinctly stated in *Hawkeye-Security Ins. Co.* v. *Meyers*, 7 Cir. 1954, 210 F.2d 890, 893, and was adopted by us in *Greyhound Corp.* v. *Excess Insurance Company of America*, 5 Cir. 1956, 233 F.2d 630:

> . . . the insurance policy is the contract between the parties and that the provisions of that contract, which are clear and unambiguous and which are neither illegal by statute nor by reason of their being against public policy, should be enforced by the courts. The courts may not re-write for the parties insurance contracts which are clear and unambiguous.

Summary final judgment against the intervenors was properly entered by the District Court. We therefore do not reach the question of punitive damages sought by the intervenors against F & D.

AFFIRMED.

WISDOM, Circuit Judge, dissenting.

I respectfully dissent.

F & D denied liability on the bond on the stated ground that "F. Wylly Clarke, Jr. was never covered". In the

complaint F & D alleged that Clarke was "the sole stockholder and alter-ego of each of the assureds"; that his fraud was therefore attributable to the assureds. This position, basic to the complaint, rendered the bond worthless to the persons for whom it was primarily issued—the owners of the premium money in the pool.

The law of contracts is not so encrusted with form that we cannot, in this case, cut through the shell of a two-party contract and give effect to the three-party arrangement all of the parties understood and on which the third party beneficiaries, to their detriment, relied. We do not have to prostrate ourselves before Clear and Unambiguous Words when in their natural setting the words mean something more than they say.

The Court's error lies in its assumption that the intervenors' case depends on showing "that it was *the underwriting intent of F & D* that the intervenors were to be beneficiaries of the bond". This is not a case involving only the formal contracting parties where the Court's task is to determine the parties' expressed intention. When third parties rely on a bond, and the bond is primarily for the protection of the third parties, a court is not justified in looking only to the underwriting intent of insurer. As Williston points out in discussing contracts for the benefit of a third person, "There is no requirement of a mutual intent, as to right of enforcement, on the part of the contracting parties; instead, it is the intent or purpose of the promisee who pays for the promise that has generally been looked upon as governing". 2 Williston on Contracts § 356. See also 4 Corbin on Contracts §§ 774, 770C and Restatement of Contracts §§ 133(b), 136(1)(a).

Here the promisee was Clarke (through his corporations). Although a purpose of the bond may have been to protect his companies from the defalcations of other em-

ployees, there is no doubt that the primary purpose was to protect the Pool Participants to whom the premium money belonged. As Messinger, head of F & D's Underwriting Department testified, a severe loss could result only from Clarke's defalcation. Business obligations to the Pool Participants compelled him to take out the bond to insure his own fidelity. He, of course, knew that the intervenors were relying on the bond for protection of the pool. The correspondence shows that F & D was fully aware of all the facts and of the intervenors' reliance on the bond. No one contends that the Pool Participants were Joint Insureds (for their employees would then be covered). The contention is that the object of the bond was to protect the Pool Participants; performance of the bond would satisfy the promisee's obligation to pay the Pool Participants; the insurer received premiums to perform its promise. The Pool was in the nature of a trust fund beneficial title to which was in the participants.

I would analogize Clarke to a bailee. He was in the business of holding premium money for others and managing it as a pool. If Clarke's companies had been in the business of storing furs, and if the furs had been destroyed by fire, the bailors could have maintained a direct action against the bailee's insurer. *Aetna Insurance Co.* v. *Eisenberg,* 8 Cir. 1961, 294 F.2d 301. If Clarke had been holding rolls of paper rejected after delivery and cancellation of the purchase order, the owner of paper would have taken the place of the insured and recovered on a fire loss. *Exton & Co.* v. *Home Fire and Marine Insurance Co.,* 1928, 249 N.Y. 258, 164 N.E. 43. If the insureds here had been storing for others distilled spirits, the owners could have sued the insurer for the value of the spirits destroyed by fire. *Lewis* v. *Home Insurance Co.,* 199 App. Div. 556, 192 N.Y. Supp. 170.

In *United States Fidelity & Guaranty Company* v. *Slifkin*, N.D. Ala. 1961, 200 Fed. Supp. 653, the pertinent policy clause was similar to Section 5 of the F & D bond: "The money, securities and other insured property (except the premises) may be owned by the Insured or held by him in any capacity whether or not the Insured is liable for the loss thereof." The court, in construing this clause, stated:

> Generally, such a clause is held to insure the bailor's insurable interest under a third party beneficiary theory, it being necessary only that there be an expression in the bailee's policy of an intent to insure the bailor's interest. * * * The express language of this clause gives to the bailor a right to be indemnified under the bailee's policy irrespective of the bailee's legal liability for the loss. . . . Elsewhere, moreover, it has been held that the bailor may maintain independently an action against the bailee's insurer in such a case, even where the bailee had deliberately omitted the bailor's claim from proofs of loss. B. N. Exton & Co. v. Home Fire & Marine Insurance Co., 249 N.Y. 258, 164 N.E. 43 (1928). See Stillwell Frozen Foods, Inc. v. North British & Mercantile Ins. Co., 184 Fed. Supp. 629 (W.D. Ark., 1960); Globe & Rutgers Fire Insurance Co. v. United States, supra. In Alabama, the general principle has been applied in other contexts: A third party beneficiary's right to bring an action directly against the obligor for enforcement of his rights under a contract to which he was not a party has been upheld repeatedly.

In *Globe & Rutgers Fire Insurance Co.* v. *United States*, 5 Cir. 1953, 202 F.2d 696, the United States brought suit against six insurance companies for loss by fire of cotton seed belonging to the Commodity Credit Corporation in the custody of a cotton gin company, the named insured. Each of the insurance policies provided: "* * * this policy shall also cover property sold but not delivered, held in trust or

on consignment or for storage." This Court held that the United States was protected by the policy provision and could bring a direct action against the insurers.

The Court seeks to distinguish the *Globe & Rutgers* case on the basis of the conceptual difference between insurance against fire losses and insurances against losses due to employee dishonesty. The insurer in the latter instance, it says, acts as an indemnitor and becomes liable only after the insurance has suffered a "proven loss". At this stage of the litigation, of course, losses due to Clarke's dishonesty must be taken as "proven". Beyond that, whether the insurance is called "property" or "indemnity" should not matter. The only distinction between the *Globe & Rutgers* situation and ours is that the cause of the loss there was natural rather than human. I am unable to understand how the Court finds that difference meaningful.

In all of these cases and many others that might be cited the third party is treated as if he were the beneficiary of a fiduciary relationship or the real party at interest. This is because the basic contract is for the benefit of the third party. Here, as to Clarke's misappropriations, the bond would have been meaningless—unless the parties had intended to protect the Pool Participants against Clarke's own defalcation.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1967

No. 24385

D. C. Docket No. Civil Action 63-186-J

AMERICAN EMPIRE INSURANCE COMPANY OF SOUTH DAKOTA, ET AL,

Appellants,

versus

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

Appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before JONES, WISDOM and DYER, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, American Empire Insurance Company of South Dakota and others, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of said District Court.

Wisdom, Circuit Judge, Dissents.

March 6, 1969

Issued as Mandate:

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 24385

AMERICAN EMPIRE INSURANCE COMPANY
OF SOUTH DAKOTA, ET AL,
Appellants,

versus

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
Appellee.

Appeal from the United States District Court for the Middle District of Florida

---

(April 3, 1969)

ON PETITION FOR REHEARING

Before JONES, WISDOM and DYER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

Wisdom, Circuit Judge, I respectfully dissent.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1969

NO. [redacted] 92

AMERICAN EMPIRE INSURANCE COMPANY OF SOUTH DAKOTA, a South Dakota Corporation, on Behalf of Itself and All Other Insurance Companies Who Were Shareholders in the USAFORM Hail Pool, STUYVESANT INSURANCE COMPANY, a New York Corporation, on Behalf of Itself and All Other Insurance Companies Who Employed U. S. & Foreign Management, Ltd. and USAFORM Pan-American, Ltd. as Reinsurance Brokerage Agents; USAFORM Hail Pool, Inc., a Florida Corporation; U. S. & FOREIGN MANAGEMENT, LTD., a New York Corporation; U. S. & FOREIGN MANAGEMENT, INC., a Florida Corporation, BARBARA MURPHY, as Receiver for Each of said Corporations; USAFORM Pan-American, Ltd.,
a Delaware Corporation,

Petitioners,

-vs-

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
a Maryland Corporation,

Respondent.

RESPONSE TO PETITION FOR CERTIORARI BY FIDELITY AND DEPOSIT COMPANY OF MARYLAND

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

NO. 1339

AMERICAN EMPIRE INSURANCE COMPANY OF SOUTH DAKOTA, a South Dakota Corporation, on Behalf of Itself and All Other Insurance Companies Who Were Shareholders in the USAFORM Hail Pool, STUYVESANT INSURANCE COMPANY, a New York Corporation, on Behalf of Itself and All Other Insurance Companies Who Employed U. S. & Foreign Management, Ltd. and USAFORM Pan-American, Ltd. as Reinsurance Brokerage Agents; USAFORM Hail Pool, Inc., a Florida Corporation; U. S. & FOREIGN MANAGEMENT, LTD., a New York Corporation; U. S. & FOREIGN MANAGEMENT, INC., a Florida Corporation, BARBARA MURPHY, as Receiver for Each of said Corporations; USAFORM Pan-American, Ltd.,
a Delaware Corporation,

Petitioners,

-vs-

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
a Maryland Corporation,

Respondent.

RESPONSE TO PETITION FOR CERTIORARI BY FIDELITY AND DEPOSIT COMPANY OF MARYLAND

No *special and important reason* is assigned by the Petitioners in their brief, as required by Rule 19 of this Court to require the Court to exercise its sound judicial discretion in granting the writ. In Petitioners' brief, pages 14 through

17, an attempt is made to state reasons, six in number, for granting the writ. The insufficiency will be pointed out:

1. The decision, by the United States Court of Appeals for the Fifth Circuit, is not in direct conflict with any decision of this Court and particularly with *Home Insurance Co. v. Baltimore Warehouse Co.*, 93 U. S. 527, S.Ct. 527, 548 and 23 L.Ed. 868, or *California Insurance Co. v. Union Cypress Co.* 133 U.S. 387, 10 S.Ct. 365, 33 L.Ed. The Home Insurance Co. case supports the Respondent's position:

> "If the merchandise be destroyed by fire, the assured may recover the entire value of the goods not exceeding the sum insured, holding the remainder of the amount recovered, after satisfying their own loss as trustees for the owners." (2d headnote)

The California Insurance Co. also supports the Respondent's position:

> "A person may insure in his own name goods held by trust by him and can recover for their entire value, holding the excess over his own interests in them for the benefit of those who have entrusted the goods to him." (2d headnote)

No decision has been made by the District Court or by the Court of Appeals *on the liability* of the F & D to its named insureds. If a named insured recovers, then the language of the above case is applicable - - - - the insured then will hold as trustee any amount due the pool participants. The Court of Appeals so held:

> "Intervenors' attempt to prognosticate the outcome of a trial on the merits of F & D's liability to the named insureds in the bond gives us little pause. F & D's liability vel non has not been decided by the District

> Court and is not now before this Court. Whether the underwriter may or may not have a defense against its named insureds is not relevant in considering F & D's liability to the Pool Participants as third party beneficiaries of the bond." (A. 10)

2. The decision, by the United States Court of Appeals for the Fifth Circuit is not in direct conflict with *Aetna Insurance Co. v. Eisenberg*, (9th C.A.), 294 F.2d 301. That fire insurance policy had not only a named insured, but was obtained under a contract which required the named insured to procure insurance for customers. This is not our factual situation; our Respondent, the F & D, positively refused to issue any bond to the Intervenor-Petitioners.

In the Aetna case, it is stated:

> "It seems perfectly clear that the policy here was a third-party beneficiary contract . . . . it does indeed insure Saul Eisenberg . . . . but it insures him for his account and 'for the act of customers hereinafter described.' The policy provided for the insurance of the Storage Receipts to the customers and for the insurance therein. The Storage Receipts covered only the property of the third-party beneficiaries, the intervenors."

'No conflict exists; because as will be shown in our discussion of the petitioners' reason, "3." next following herein, the law of the State of Florida and not the law of Arkansas is applicable. The decision by the Court of Appeals is based upon Florida law (A. 14): *American Surety Company of N. Y. v. Smith*, (Fla. 1930), 100 Fla. 1012, 130 So. 440; *Leon v. Kerrison*, 47 Fla. 178, 36 So. 173; *Wright v. Terry*, 23 Fla. 160, 2 So. 6; 7 Fla. Juris, 169, Contracts Section 101; *First National Bank of St. Augustine, et al v. Perkins*, Fla. 1921, 81 Fla. 341,

87 So. 912; *Punta Gorda Bank v. State Bank of Ft. Meade,* Fla. 1907, 52 Fla. 399, 42 So. 846.

We emphasize the Respondent, F & D, not only did not insure the pool participants, but positively refused to insure them.

3. The decision, by the United States Court of Appeals for the Fifth Circuit is in accord with the law of Florida. The reference to "general law" necessarily means the Florida law. This general law is found in decisions by the Florida courts and in decisions by our Court of Appeals applying the Florida law. Florida cases sustaining the decision are found in the decision. (A. 14, A. 15)

The Florida rule is accurately stated in *First Nat. Bank of St. Augustine, et al v. Perkins et al,* (S. Ct.), 87 So. 912:

> "In order that a promise made by one person to another for the benefit of a third person shall constitute the first the debtor of the third and entitle the third person to sue the first on such promise, it must appear that there was a clear intent upon the part of both the first and the second that the first person shall become such debtor. The mere fact that the third might be benefited is not sufficient."

The Court of Appeals relied only on these Florida decisions. It correctly ruled; only the named insured had any right under the bond of the Respondent. It confirmed an intent to benefit third parties must be clearly expressed and found that this intent had not been *so expressed* in the bond of the Respondent:

> "Since contracting parties are presumed to act for themselves, such an intent to benefit should be clearly expressed in the contract." (A. 14) *American Surety Co.*

of New York v Smith, (Fla. 1930), 130 Fla. 1012, 130 So. 440.

The opinion by Mr. Justice Brannar in *Appalachian Power Company v. American Institute of Certified Public Accountants*, (N.Y. 1959), 80 S.Ct. 16, 4 L.Ed.2d 30 states the position of this Court when a determination of state law has been made by the District Court and the Court of Appeals:

> "The petitioners state that three contentions will be raised. One is that the District Court and the Court of Appeals erred in their conclusion as to the relevant state law but this Court ordinarily accepts the determination of state law as found by the Court of Appeals particularly when, as here, the same finding is made by the District Court and no showing has been made to persuade me that such would not be the case here."

In *Wichita Royalty Co. v. City National Bank of Wichita Falls*, 306 U.S. 103, 83 L.Ed. 515, this Court said:

> "It was the duty of the federal court to apply the law of Texas as declared by its highest court."

As Florida law is applicable and the Court of Appeals correctly applied the Florida law, the decision need not be reviewed by certiorari.

4. The decision, by the United States Court of Appeals for the Fifth Circuit, correctly applied the Federal Rules of Civil Procedure. As no factual or contractural basis is presented, which required the application of Rule 17(a), the decision is correct. As the Florida decisions control the rights of a person or party to institute a suit on the fidelity bond, only the named insureds are proper parties. No other parties can assert any claim as a real party in interest under the rule referred to.

We have referred to these decisions heretofore. As no genuine issue as to any material fact existed, it was proper for the Court to enter the summary judgment. Rule 17(a) can have no application when the Florida decisions squarely hold the Intervenors have no rights under the bond involved in the litigation. Nowhere in the record is there any evidence that the Respondent ever communicated with the Intervenor-Petitioners. The evidence before the Court established positively the refusal by Respondent to name any one except the parties actually written in the bond as named insureds. The underwriter, whose testimony was never contradicted, established this. His letter (R. 65) stated:

> "We cannot extend the bond to the Pool's participants since they do not qualify as 'Joint Insureds'. Our liability is confined to --- (the named insured) and we cover only the losses which it may sustain through acts covered by the bond . . . The Pool's participants are not eligible to be Joint Insureds under the bond under our rules because to include them as such would make the bond liable for the act of their employees, ..."

The Intervenor-Petitioners seek to eliminate all of these "nots" in the letter, distorting it to be a positive rather than a negative declaration. (R. 65) These "nots" are restated with underlining added:

> "We can*not* extend the bond to the Pool's participants since they do *not* qualify as 'Joint Insureds'.
>
> ". . . is covered by the bond but *not* directly in favor of the Pool's participants.
>
> ". . . are *not* eligible to be Joint Insureds under the bond."

The Respondent emphasizes that this litigation involves a

fidelity bond. It does not involve a fire insurance policy on particular items of personal property. It did not cover bales of ten dollar bills or stacks of silver dollars. The fidelity bond does not provide coverage for *property* that has been destroyed or lost. It provides only fidelity protection. If a fidelity loss occurs this loss is represented by a bookkeeping entry but it is not represented by any loss of specific property.

This distinguishes the case of Globe and *Rutgers Fire Insurance Co., et al v. U.S.*, 5 Cir. 1953, 202 F. 2d 696. The Court of Appeals so found:

> "We are of the firm view that the F & D's contract meant just exactly what it clearly said, that is, that it insured the named corporations and those corporations only, against the defalcations of their employees. We can find no support for the intervenors' contention that the District Court should rewrite the contract."

We dispute certain false and misleading statements made by the Intervenor-Petitioners in their Petition. (Pet. 5). It is stated, "The thief was the sole stockholder...". Again, it is stated, "Whether the action had to be brought by the named insured, who was the thief...". The Petition for Writ of Certiorari refers to personnel of the Intervenor-Petitioners as "sophisticated insurance company executives". It seems odd that these sophisticates should inject an issue which is not established by the record. Nowhere in the record is:

a. A criminal judgment determining any one is a thief,

b. A civil judgment determining any one is a thief,

c. A contract indicating any one is a thief,

d. A stipulation that any one is a thief,

e. An indication of why Florida Statute 626.0605 (Pet. 4) relating to misrepresentation is presented to this Court.

The statement seems to be a figment flowing from a failure by the sophisticates to adequately protect themselves.

The F & D has never accepted as true any loss under the bond by thievery or otherwise. The record discloses no proof of thievery. The record does show by the Respondent's Vice President, Mr. Barnett: (R. 212)

> "No, we don't know that there was any dishonesty on Mr. Clarke's part. What we are saying is that the receiver is claiming dishonesty and based on his claim we turned it down on the theory that if there was any dishonesty it was known to the corporation head."

As Respondent, F & D, never has recognized any act that would subject it to any liability, particularly a theft, and as no reference is made in Support of the statement in the Petition establishing its truth, it appears to present an issue yet to be tried in the District Court. It is not an issue here.

5. The decision, by the United States Court of Appeals for the Fifth Circuit, necessarily determined the issue of punitive damages as *presented by the pleadings in the record.* (R. 101-107, R. 111-113, R. 113-114, R. 119-120) The Intervenor-Petitioners, by reference to other counts in the record, added allegations to counts V, X and XI. These three counts will be discussed separately.

To count V (R. 13-114) is added certain paragraphs in count I. Without copying all of the allegations so brought forward into count V, we emphasize these:

> "2. Pursuant to this Court's Order . . . . American Empire Insurance Company . . . appears on behalf of itself and all other insurance companies who were share-

holders in said USAFORM Hail Pool, referred to herein as 'pool participants' . . ." (R. 101)

"(b) That on February 1, 1962, plaintiff replied to Clarke's letter giving assurances that the pool participants' money was fully protected and insured by said bond." (R. 106)

"14. That by virtue of the January 16, 1962 letter from Clarke and plaintiff's reply of February 1, 1962, the pool participants were named insureds under said Bond as to moneys or other properties, deposited with USAFORM Hail Pool, Inc." (R. 106-107)

"15. . . . . or otherwise misappropriate . . . premium moneys on deposit . . . . belonging to the pool participants . . ." (R. 107)

Furthermore, count IV is brought forward by reference into count V. (R. 111) In count IV is paragraph 5:

"5. . . . . and plaintiff never intended to cover Clarke under said Bond, and never intended to extend coverage to the pool participants." (R. 111)

Also see paragraphs 7 and 9 in count IV:

"7. Plainitff made the aforedescribed representations with the intent to deceive the named insureds and the pool participants, ... for the purpose of inducing the pool participants to deposit premium monies with the named insureds." (R. 112)

"9. That by reason of the plaintiff's aforesaid fraudulent representations, acts and conduct, the pool participants have been damaged in the sum of $311,624.58. . . . that by reason of the foregoing plaintiff should pay the pool participants punitive or exemplary damages."

So count V, with these additions by reference, asserts claims for the Intervenor-Petitioners. The Court of Appeals properly decided that pool participants' claims were intended to be disposed of as asserted in count V. As the Intervenor-Petitioners had no legal claim, the question of damages, and particularly punitive damages, became unimportant. This was the decision: The Court of Appeals dealt with the pleadings presented to it which pleadings asserted claims on behalf of pool participants.

We emphasize, the Intervenor-Petitioners purposely intermingled and co-joined all their claims. Any decision made by the Court of Appeals had to be based on their rights as asserted in the paragraphs from other counts made a part of count V.

Count X makes reference to count VI. Count VI likewise makes reference to paragraphs in count I. These references bring in claims that are asserted on behalf of the Intervenor-Petitioners; consequently, the same problem is presented here as was presented with respect to count V. The Court of Appeals correctly determined the Intervenor-Petitioners had no legal rights and, therefore, the question of damages was unimportant.

Count XI likewise uses the reference method. (R. 120) It brings in count X and, of course, count X brought in count VI. This makes count XI and count X the same except for the change of name of a party. With this type of pleading before the Court of Appeals, it legally determined that the rights of Intervenor-Petitioners were co-mingled in this count, as they were in counts V and X; and as Intervenor-Petitioners had no legal rights under the bond,damages became of no consequence.

6. The decision, by the United States Court of Appeals for the Fifth Circuit, legally granted the partial summary judgment pursuant to the Federal Rules of Civil Procedure, Rule 56. The Florida Rules of Civil Procedure were not applicable.

The decisions from Florida courts cited by the Intervenor-Petitioners relating to summary judgments under Florida Rules of Civil Procedure are unimportant and are not controlling. As this suit is in the United States District Court, it is controlled only by the Federal Rules of Civil Procedure. It is in conformity with decisions construing these Rules: In *Bruce Construction Corp. v. United States of America for use of Westinghouse Electric Supply Company,* (5th C.A.), 242 F.2d 873, the Federal Rule is answered and is applicable:

> "But, equally vigorous in giving full range to this mechanism, we have just as consistently rejected any notions that pretense, or apparent formal controversy can thwart application of this rule or hamstring the court in determining whether it is a proper case for it Consequently, when a movant makes out a convincing showing that genuine issues of fact are lacking, we require that the adversary adequately demonstrate by receivable facts that a real, not formal, controversy exists, and, of course, he does not do that by mere denial or holding back evidence."

In *National Screen Service Corp. v. Poster Exchange, Inc.,* (5th C.A.) 305 F.2d 647, it is said:

> "We come first to a consideration of the applicable principles relating to summary judgments under Federal Rule of Civil Procedure 56, 28 U.S.C.A. The law is well settled that in order to entitle the moving party to summary judgment, it must be clearly shown: (1) that there is no genuine issue as to any material fact

in the case; and (2) that he is entitled to a judgment in his favor as a matter of law."

In *Boyce v. United States of America,* (5th C.A.), 373 F.2d 794, it is stated:

> "We agree with the trial court that this defense does not raise a material issue of fact requiring submission of the case to a jury. There is only a legal question to resolve. . . . The trial court correctly entered a summary judgment for the United States."

The District Court found that under the Rules:

> ". . . the pleadings, depositions and affidavits on file show that there is no genuine issue as to any material fact that in law would permit the recovery of punitive damages under any one of the counterclaim counts against the Fidelity and Deposit Company and that it, as the plaintiff, is entitled to judgment as a matter of law insofar as each of said counterclaim counts seeks to recover punitive damages from the Fidelity and Deposit Company. . . . The Court further finds . . . . that there is no genuine issue as to any material fact that would sustain the right of any one of the intervenors . . . or the underwriters of pool participants, ... to recover under the bond. . . . either as a named insured or as a third party beneficiary protected by the bond, although not named therein as an insured." (R. 255)

The Court of Appeals affirmed this finding of no genuine issue as to any material fact. The Court of Appeals applied the law of Florida. This is correct. The Court of Appeals properly applied the Federal Rules of Civil Procedure. This is correct. The Court of Appeals properly interpreted the decisions of this Court and of the Court of Appeals for the Fifth

Circuit. This is correct. No conflict arose between this decision and a decision of another Court of Appeals on the same subject which was applicable to the questions involved requiring the application of Florida law. The law of Florida was applied by the Court of Appeals, as appears from the decision.

As all of the reasons asserted by Intervenor-Petitions were presented to the Court of Appeals originally and by their Petition for Rehearing, no reason exists for granting the Writ of Certiorari.

The Respondent, F & D, respectfully urges the Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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PROOF OF SERVICE OF RESPONDENT TO WRIT OF CERTIORARI BY FIDELITY AND DEPOSIT COMPANY OF MARYLAND

Harry T. Gray hereby certifies that he is one of the attorneys of record for the Respondent and that on the ..... day of June, 1969 a true and correct copy of the foregoing response was deposited in the United States Post Office with first class postage prepaid at Jacksonville, Florida, addressed to counsel of record for the Petitioners, W. Warren Cole, Jr. of Black, Cobb, Cole, Crotty & Sigerson, 444 North Beach Street, Post Office Box 191, Daytona Beach, Florida.

.....

Harry T. Gray, as Attorney

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JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1969

No. [redacted] 92

AMERICAN EMPIRE INSURANCE COMPANY OF SOUTH DAKOTA, a South Dakota Corporation, on Behalf of Itself and All Other Insurance Companies Who Were Shareholders in the USAFORM Hail Pool; STUYVESANT INSURANCE COMPANY, a New York Corporation, on Behalf of Itself and All Other Insurance Companies Who Employed U. S. & Foreign Management, Ltd. and USAFORM Pan-American, Ltd. as Reinsurance Brokerage Agents; USAFORM Hail Pool, Inc., a Florida Corporation; U. S. & FOREIGN MANAGEMENT, LTD., a New York Corporation; U. S. & FOREIGN MANAGEMENT, INC., a Florida Corporation, BARBARA MURPHY, as Receiver for Each of said Corporations; USAFORM Pan-American, Ltd., a Delaware Corporation.

Petitioners,

vs.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Maryland Corporation.

Respondent.

REPLY BRIEF OF PETITIONERS SEEKING A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1339

AMERICAN EMPIRE INSURANCE COMPANY OF SOUTH DAKOTA, a South Dakota Corporation, on Behalf of Itself and All Other Insurance Companies Who Were Shareholders in the USAFORM Hail Pool; STUYVESANT INSURANCE COMPANY, a New York Corporation, on Behalf of Itself and All Other Insurance Companies Who Employed U. S. & Foreign Management, Ltd. and USAFORM Pan-American, Ltd. as Reinsurance Brokerage Agents; USAFORM Hail Pool, Inc., a Florida Corporation; U. S. & FOREIGN MANAGEMENT, LTD., a New York Corporation; U. S. & FOREIGN MANAGEMENT, INC., a Florida Corporation, BARBARA MURPHY, as Receiver for Each of said Corporations; USAFORM Pan-American, Ltd., a Delaware Corporation,

Petitioners,

vs.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Maryland Corporation,

Respondent.

REPLY BRIEF OF PETITIONERS

This brief is directed to the argument first raised in Respondent's brief to this Court, that there is no special

and important reason under Rule 19 for granting writ of certiorari and specifically to Respondent's argument that the decision of the Court of Appeals for the Fifth Circuit is in accord with the law of Florida. To the contrary, we respectfully submit that there are compelling reasons for granting certiorari in the case at bar, particularly in light of the landmark decision of the Supreme Court of Florida in *Shingleton and Nationwide Mutual Insurance Company* v. *Bussey*, filed May 28, 1969.[1] This decision, announced since the filing of the Petition for Writ of Certiorari in this cause, clearly indicates that the Fifth Circuit decision herein is not only contrary to the general law of Florida, but also violates the Florida State Constitution.

In *Bussey*, the Florida Supreme Court held that the trial court erred in dismissing Nationwide Mutual Insurance Company as a party defendant in an action against its insured arising out of an automobile collision. The liability policy involved contained a "no-joinder" restriction which specified that the insurance company could not be joined as a defendant in any action against its insured. The injured plaintiff was simply a member of the general public, and her identity was not known to the insurer until the claim was filed. The Florida Supreme Court declared that "members of the

1 The best citation that we can furnish the Court at this time is as follows: *Frances Ruth Bennett Shingleton and Nationwide Mutual Insurance Company, an Ohio corporation, Petitioners,* v. *Elizabeth Reiff Bussey, Respondent.* In the Supreme Court of Florida, January Term, A.D. 1969, Case No. 37,636.

We will hereinafter refer to this case simply as *Bussey*. The Supreme Court of Florida filed its opinion in this case on May 28, 1969, and the Court has not yet disposed of the Petition for Rehearing that was filed. Obviously, *Bussey* has not yet been published in the Southern Reporter, but we have printed the case as an appendix to this brief. While a denial of the Petition for Rehearing in *Bussey* would appear to dictate reversal of the Fifth Circuit's judgment in the case at bar, a granting of the Petition for Rehearing would not suggest the opposite result.

public" are third party beneficiaries of liability insurance policies, and, as such, have a right of *direct action* against the insurer, voiding the express "no-joinder" restriction written in the insurance policy.

In the case at bar property belonging to the third party beneficiaries (A-9) was directly insured under the fidelity bond (R-64), the identity of the third party beneficiaries was specifically known to the insurer (R-60), and the insurance contract did not contain *any* specific "no-joinder" restriction (R-11). Obviously, the right of direct action against the insurer in our case is much stronger than in *Bussey*.

Early in the *Bussey* decision, the Florida Supreme Court announced its conclusion:

> "We conclude a direct cause of action now inures to a third party beneficiary against an insurer in motor vehicle liability insurance coverage cases as a product of the prevailing public policy of Florida.
>
> Public policy is a molding device available to the judicial process by which changing realities and the attending manifested rules of fair play may be incorporated into our corpus juris."

Casting aside "traditional notions" concerning "direct" vs. "incidental" benefits such as raised by Respondent herein, the Florida Court observed that:

> ". . . we are convinced that the time has arrived when the legal reasons advanced in favor of joinder and direct action against an insurer outweigh and preponderate over the traditional notions asserted to justify precluding an injured third party from enjoying such rights."

The Court went on to emphasize:

> "The unfettered right of a plaintiff to sue defendants jointly is so universal and essential to due process

> that it can rarely be curtailed or restricted by private contract between potential defendants. An insurer is free not to enter into a liability policy with an insured, but if it does so it cannot unreasonably circumscribe its potential liability under the contract by stipulating therein restraints upon the right of the third party beneficiary to sue directly an insurer contingently or secondarily liable and to join the insurer as a defendant in the action to determine the liability of the insured."

Of course, in the case at bar, there was no express "no-joinder" restriction contained in the insurance contract (R-11).

The Florida Supreme Court continued:

> "The insured and the insurer cannot constitutionally contract away or postpone the speedy and adequate remedy the law affords a third party, nor impose unusual limitations upon the latter's right to jointly sue adverse parties."

The above quoted language stands in sharp contrast to the assertion made by Respondent as to the Florida law concerning the right of a third party beneficiary to sue an insurer directly!

Summarizing, the Court said:

> "In any case, it seems anomalous to public policy to procedurally sanction and condone a situation where the ultimate beneficiary of policy proceeds is deprived by a provision in the policy of an open, speedy and realistic opportunity to pursue by due process his right of an adequate remedy at law jointly against the insured and insurer."

It is without dispute in the case at bar that the Pool Participants will be the ultimate beneficiaries of a recovery of insurance policy proceeds (R-124-127).

The Florida Supreme Court concluded with a statement that is both simple and wise:

> "If joinder is allowed initially, all the cards are on the table and all interrelated claims and defenses can be heard and adjudicated reciprocally among all parties and the plaintiff will have the same initial right as insurer now avails itself against plaintiff to protect his rights against the insurer. In this manner the interests of all the parties and the concomitant right to expeditiously litigate the same in concert are preserved."

Bussey furnishes a special and important reason under Rule 19 for granting the writ, a reason which is in addition to those suggested by our Petition for Writ of Certiorari.

RESPONDENT'S BRIEF

We do not think it necessary to reply specifically to the other points raised by Respondent's brief, except Respondent's statement on page 2 and page 7 (where Petitioners are accused of false and misleading statements) that no theft or liability has been proven. Passing over the conclusion of F & D's own investigator that "Clarke has gutted . . . these insured corporations" (R-253), we would point to Judge Wisdom's comment that:

> "At this stage of the litigation, of course, losses due to Clarke's dishonesty must be taken as 'proven'." (A-20).

Anyone possessing an elementary knowledge of the mechanics of litigation would concur with Judge Wisdom.

CONCLUSION

We would join the Respondent in citing to this Court *Wichita Royalty Company* v. *City National Bank of Wichita Falls,* 306 U.S. 103, 83 L.Ed. 515, where this Court said:

> "It was the duty of the federal court to apply the law of Texas as declared by its highest court."

And we would paraphrase Respondent's comment at page 5 of its brief, by saying that as Florida law *is* applicable and since the Court of Appeals failed to correctly apply the law, its decision *needs* to be reviewed by certiorari.

The power of this Court is co-extensive with all possible necessities insofar as litigation in the Federal Courts of Appeal is concerned, *Forsyth* v. *City of Hammond,* 166 U.S. 506, 17 S.Ct. 665, 41 L.Ed. 1095. We respectfully submit that in the interests of justice any one of three courses of action may be taken by this Court.

1. The Petition for Certiorari could and should be granted for the purpose of considering this case on its merits. Conflict with the law of Florida as expressed in many cases, including *Bussey,* has been suggested; there is conflict between the Eighth Circuit Court of Appeals and the Fifth Circuit Court of Appeals; there is conflict with the decisions of this Court. Rule 17(a), Federal Rules of Civil Procedure, was violated by the decision below.

2. The Petition for Writ of Certiorari could be granted for the express purpose of certifying the question to the Supreme Court of Florida in light of *Bussey.*

3. Without prejudice to any party, this case could be remanded to the Fifth Circuit Court of Appeals for reconsideration in light of *Bussey.*

Insurance is an important institution in America, and in the modern world. It is no longer merely a matter of private contract, but is clothed with a great public interest. The time has come for this Court to furnish judicial guidelines defining the requirements of due process of law in the resolution of disputes between insurer, insured, and third party claimants.

Respectfully submitted,

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IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A.D. 1969

FRANCES RUTH BENNETT SHINGLETON and NATIONWIDE MUTUAL INSURANCE COMPANY, an Ohio corporation,

Petitioners,

vs.

ELIZABETH REIFF BUSSEY,

Respondent.

No. 37,636

Opinion filed May 28, 1969

Writ of Certiorari to the District Court of Appeal, First District

Keen, O'Kelley & Spitz, A. Frank O'Kelley, Chas. H. Spitz and Helen C. Ellis, for Petitioners

Parker, Foster & Madigan, Leo L. Foster and Gayle Smith Swedmark, for Respondent

Raymond Ehrlich for American Insurance Association, American Mutual Insurance Alliance and National Association of Independent Insurors, Amicus Curiae

Charles S. Ausley and John S. Cox for Federation of Insurance Counsel and Florida Defense Lawyers Association, Amicus Curiae

ERVIN, C. J.:

The District Court of Appeal, 1st District, held in this case, 211 So.2d 593, that the trial court erred in dismissing the appellant Nationwide Mutual Insurance Company as a party defendant in an action against its insured, appellant Shingleton, arising out of an automobile collision.

We find conflict of decisions between the District Court's holding in this case and Artille v. Davidson (1936), 126 Fla. 219, 170 So. 707, and Thompson v. Safeco Insurance Co. of America (Fla. App. 1967), 199 So.2d 113, and accept jurisdiction to review on certiorari.

However, on the merits, we find, as did the District Court of Appeal in the instant case, that since our decision in Artille in 1936, which was followed by the District Court of Appeal, 4th District, in Thompson, the applicable law governing this controversy has undergone material alteration sufficient to convince us we should affirm the District Court. Our reasons therefor are outlined hereinafter.

We conclude a direct cause of action now inures to a third party beneficiary against an insurer in motor vehicle liability insurance coverage cases as a product of the prevailing public policy of Florida.

Public policy is a molding device available to the judicial process by which changing realities and the attending manifested rules of fair play may be incorporated into our corpus juris. The classic opinion by Mr. Justice Cardozo in MacPherson v. Buick Motor Co. (1916), 217 N.Y. 382, 111 N.E. 1150, is illustrative of the role of public policy as a catalyst toward the advancement of jurisprudence.

The District Court concluded that liability policies as the one here involved should be construed as "quasi-third party beneficiary contract," thereby giving the injured third party an unquestionable right to bring a direct action against the insurance company as a party defendant.

Although the District Court did not undertake to expound on the rationale of this theory, we believe the reasoning advanced by the Illinois District Court of Appeals

in Gothberg v. Nemerovski (1965), 58 I. App. 2d 375, 208 N.E.2d 12, is particularly responsive to this problem. In addressing itself to the theory underlying the maintenance of a suit against an insurance broker who virtually occupied the position of insurer, the Illinois Appellate Court stated in part (at 19-20):

> "[11, 12] In substance, defendant contends that the plaintiffs cannot recover under the third party beneficiary doctrine because the contract was not made for their direct benefit, and, if anything, they are only incidental beneficiaries. Defendant argues for the application of the rule stated in Carson Pirie Scott & Co. v. Parrett, 346 Ill. 252, 257-258, 178 N.E. 498, 501, 81 A.L.R. 1262 (1931):
>
> " 'The test is whether the benefit to the third person is direct to him or is but an incidental benefit to him arising from the contract. If direct, he may sue on the contract; if incidental he has no right of recovery thereon. . .
>
> " '. . . The rule is, that the right of a third party benefited by a contract to sue thereon rests upon the liability of the promisor, and this liability must affirmatively appear from the language of the instrument when properly interpreted and construed. The liability so appearing cannot be extended or enlarged on the ground alone that the situation and circumstances of the parties justify or demand further or other liability.'
>
> "[13] Because of the peculiar significance of automobile liability insurance as well as the provisions of the policy contemplated by the parties and eventually issued, we do not agree with defendant's theory. We believe that these plaintiffs can sue defendant directly. The plaintiffs can be considered third party beneficiaries of the contract to procure insurance entered into between Jackson and defendant, that is, they had a sufficient interest in such a contract to bring suit directly for its breach. In entering into

this contract to procure insurance, it is a fair and reasonable inference that Jackson and his mother were contemplating possible injury to unidentified third parties, and the insurance coverage was for the direct benefit of third parties who might be injured through Jackson's negligence. Because Jackson, as the insured, was to be directly benefited by the insurance coverage, does not preclude the fact that others were also intended to be directly benefited.

"[14] The general public, subjected to possible injury through Jackson's negligent operation of a motor vehicle, possessed more than a mere 'incidental' benefit from the contract to procure public liability insurance. It was, in effect, a real party in interest to this contract. The procuring of automobile public liability insurance of the type contemplated has connotations extending to the general public above and beyond the private interests of the two contracting parties. As was said by our Supreme Court in Simmon v. Iowa Mutual Casualty Co., 3 Ill.2d 318, 322, 121 N.E.2d, 509, 511 (1954):

"'Automobile insurance has taken an important position in the modern world. *It is no longer a private contract merely between two parties.* The greater part of litigation in our trial courts is concerned with claims arising out of property damage, personal injury or death caused by operation of motor vehicles. The legislatures of all our States have recognized the hazards and perils daily encountered and as a result have enacted various pieces of legislation aimed at the protection of the injured party. Financial Responsibility acts, Unsatisfied Judgment Fund acts, and other similar laws are direct results of this concern. That the general welfare is promoted by such laws can be little doubted. Government and the general public have an understandable interest in the problem. Many persons injured and disabled from automobile accidents would become public charges were it not for financial assistance received from the insurance companies.'

"[15] The fact that plaintiffs' identity may not have been known at the time the contract to procure insurance was made does not prevent them from assuming the status of third party beneficiaries. . . ." (Emphasis in text).

We have quoted extensively from the Illinois Appellate Court opinion because its reasoning is enlightening in demonstrating that the third party beneficiary doctrine encompasses, substantively speaking, a cause of action against an insurer in favor of members of the public injured through the acts of an insured. Support for this view is buttressed by the State's Financial Responsibility Law, Ch. 324, Florida Statutes.

It cannot be disputed that securance of liability insurance coverage protection for the operation of a motor vehicle, regardless of whether the policy is secured to meet the requirements of Ch. 324, F.S., is an act undertaken by the insured with the intent of providing a ready means of discharging his obligations that may accrue to a member or members of the public as a result of his negligent operation of a motor vehicle on the public streets and highways of this state.

Viewed in this light, we think there exists sufficient reason to raise by operation of law the intent to benefit injured third parties and thus to render motor vehicle liability insurance amenable to the third party beneficiary doctrine.

Once it is established that a person injured by the act of an insured while operating a motor vehicle is a party entitled to maintain a cause of action directly against the liability insurer of the tort feasor, the question then presented is when may the injured third party exercise his right to bring suit on the cause of action vested in him. Resolution of this question entails the effect to be

attributed to rules of civil procedure and provisions of the policy as well as the process of weighing and measuring certain countervailing public policies.

It seems reasonable to view the cause of action against an insurer in favor of an injured third party as vesting in or accruing to the injured party at the same time he becomes entitled to sue the insured, assuming, of course, due notice of the injured party's claim has been given insurer and it has had opportunity to duly investigate the same.

Of course, by the very nature of liability insurance it is axiomatic that liability of the insured is a condition precedent to liability of the insurer on the cause of action against it by the injured third party. Such condition, however, does not effect a postponement in liability to be sued but only makes the liability of the insurer to judgment contingent on the establishment of liability to judgment of the insured; therefore, there is nothing inherent in the general nature of liability insurance which would operate to preclude an injured third party beneficiary from directly suing and joining the insurer as a codefendant in the action to determine the insured's liability.

In the present case, the policy of insurance contains provisions to the effect that no action shall lie against the insurer until the amount of the obligation of the insured shall have been finally determined by judgment and that the policy shall not give any right to join the insurer in any action to determine the liability of an insured. We are aware that a majority of those jurisdictions which have had occasion to adjudicate the efficacy of such clauses are aligned in sustaining them as a bar to direct action against and joinder of an insurer in an action to determine the liability of an insured. See Appleman, *8 Insurance Law and Practice*, §§ 4851-66. However, we are

convinced that the time has arrived when the legal reasons advanced in favor of joinder and direct action against an insurer outweigh and preponderate over the traditional notions asserted to justify precluding an injured third party from enjoying such rights. Compare Georgia Southern & Florida Ry. Co. v. Seven-Up Bott. Co. (Fla.), 175 So.2d 39.

It can hardly be disputed that motor vehicle liability insurance is a subject necessarily lending itself to regulation imposed by the State in the exercise of its police power. It is a subject affected with a public interest and its regulation in a multiple of ways for the protection of the general public has become of more and more importance in the passage of years and changing times. This being the case, it is not unreasonable to restrict or limit the effect of express contractual provisions where the same collide with those considerations which affect the interests of the public generally. Where, for example, they collide with principles of due process and equal protection, and the right to a full and adequate remedy of law guaranteed all citizens.

The provisions prohibiting joinder and direct action in the case sub judice do not merely attempt to defer the liability of the injured, but in addition seek to defer, subject to the same condition, the right of an injured third party beneficiary to maintain a cause of action against the insurer. In the modern world which is fraught with public safety hazards, it is unrealistic that mass liability insurance coverage designed to afford protective benefits for the general public should contain such condition precedent as a barrier to the right of identified members of the protected class to pursue a speedy, realistic and adequate recovery action. This hardly comports with Section 4, Declaration of Rights, State Constitution, that the

courts shall be open so that persons injured shall have remedy by due course of law without denial or delay.

Admittedly, a contract of insurance can be entered into which imposes certain reasonable conditions or limitations on the responsibility of the insurer to pay out the proceeds or benefits contemplated by the contract. But such conditions cannot unreasonably burden or curtail the otherwise actionable right of a third party beneficiary to sue jointly the parties charged with liability, viz., the tort-feasor and the insurer of the tort-feasor. The insurer is, of course, not a joint tort-feasor. The unfettered right of a plaintiff to sue defendants jointly is so universal and essential to due process that it can rarely be curtailed or restricted by private contract between potential defendants. An insurer is free not to enter into a liability policy with an insured, but if it does so it cannot unreasonably circumscribe its potential liability under the contract by stipulating therein restraints upon the right of the third party beneficiary to sue directly an insurer contingently or secondarily liable and to join the insurer as a defendant in the action to determine the liability of the insured.

Such a view is particularly warranted where as in the present case the injured party plaintiff is a nonconsenting party to the contract and derives standing as a third party beneficiary entitled to sue in a direct joint action to recover the benefits of the policy by virtue of operation of law.

The insured may agree to conditions vis-a-vis the insurer to waive his own constitutional rights and curtail or postpone his remedies under the policy, but it is a contradiction of public policy to contract for liability coverage for members of the public and simultaneously deny a beneficiary thereunder the ordinary rights of a litigant

to sue for such coverage through the restraint of a "no joinder" clause. It is an anomaly in the law and discriminatory for the parties to a contract to attempt to deny nonconsenting members of the public a full, complete, adequate remedy at law which is constitutionally guaranteed all citizens.

The insured and the insurer cannot constitutionally contract away or postpone the speedy and adequate remedy the law affords a third party, nor impose unusual limitations upon the latter's right to jointly sue adverse parties. Balanced, therefore, against the public policy of this state favoring the elimination of multiplicity of suits and unreasonable impediments to the remedial process of adjudication of adversary rights conferred by the operation of substantive principles of law, we think the "no joinder" restriction in the subject policy goes much too far and therefore should be construed as securing for the insurer only the right to assert the nonliability and not the nonjoinder of the insured with the insurer as a condition precedent to the liability of the insurer.

In reaching the foregoing conclusion, we are cognizant that the primary reason advanced in those jurisdictions which have sustained "no joinder clauses" in the area of liability insurance is that such a clause serves to prevent prejudice to the insurer through the prophylactic effect of isolating from the jury's consideration any knowledge that coverage for the insured exists. Such a result is deemed desirable because of the notion that a jury is prone to find negligence or to augment damages, if it thinks that an affluent institution such as an insurance company will bear the loss. See Appleman, 8 Insurance Law and Practice, § 4861. While we will not go so far as to assert that the above proposition has been all but obliterated by the more recent indications to the effect

that the injection of insurance does not operate to increase the size of jury verdicts, we do think the stage has now been reached where juries are more mature. Accordingly, a candid admission at trial of the existence of insurance coverage, the policy limits of same, and an otherwise aboveboard revelation of the interest of an insurer in the outcome of the recovery action against insured should be more beneficial to insurers in terms of diminishing their overall policy judgment payments to litigating beneficiaries than the questionable "ostrich head in the sand" approach which may often mislead juries to think insurance coverage is greater than it is.

It can hardly be denied that one of the fundamental goals of modern procedural jurisprudence is to secure a method of providing an efficient and expeditious adjudication of the rights of persons possessing adverse interests in a controversy. The liberal joinder provisions of Rule 1.210(a), Florida Rules of Civil Procedure, acknowledges this policy by providing: "Any person may be made a defendant who has or claims an interest adverse to the plaintiff." This requirement of the procedural rules raises the presumption that unless the Legislature in the exercise of its police power regulation of insurance, affirmatively gives insurers the substantive right to insert "no joinder" clauses in liability policies there is no basis in law for insurers to assume they have such contractual right as a special privilege not granted other citizens to contract immunity with their insureds from being sued as joint defendants by strangers.

The District Court in its decision has ably spelled out the interests of an insurer in actively participating in the litigation brought against its insured. In addition to the reasons assigned by the District Court for such participation, there are certain facets to the question of

joinder which we believe emphatically support the objective of a single law suit as a measure for affording complete adjudication of the tripartite interests whether they be concurrent or conflicting.

It is not altogether improbable that situations may arise where an injured third party has a very real interest in promptly aligning the insurer with the insured in a recovery action in order to timely adjudicate all questions concerning the coverage supplied the insured by the insurer. The fact situations recently encountered in certain cases decided by our Court (e.g., Bergh v. Canadian Universal Insurance Co., 1968, 216 So.2d 436, and Sellers v. U. S. Fidelity, 1966, 185 So.2d 689) emphasize the importance that an injured party plaintiff have the advantage of an ordinary litigant from the moment of injury, i.e., from the accrual of his cause of action, of judicial oversight of the policy provisions affecting his claim and to that end to press his claim by suit, if desired, against both the insured and insurer as a necessary incident to the recovery of his loss. Delays of the insured in filing proof of claim, claims of excess or other insurance, claims of misrepresentation, failure to seek early arbitration, and a variety of other defenses growing out of policy provisions can be asserted vis-a-vis the liability of the insurer against the insured which may operate, and often do, to defeat recovery by the injured third party beneficiary.

The dangers inherent in such situations may be compounded when for one reason or another the insured negligently fails, or has little reason to zealously seek to secure for the injured third party whatever protection may be derived from the policy with the insurer.

In any case, it seems anomalous to public policy to procedurally sanction and condone a situation where the ultimate beneficiary of policy proceeds is deprived by a

provision in the policy of an open, speedy and realistic opportunity to pursue by due process his right of an adequate remedy at law jointly against the insured and insurer. Especially is the result obtained by such policy restriction incongruous where the insurer participates in the controversy, not as a joint defendant in the proceedings brought by the injured plaintiff against the insured, but, rather, as the undisclosed guardian of the interests and rights of the insured—and of course, of the insurer's interest also. In such cases, it is hard to imagine all of the many difficulties which could operate to impede the injured third party plaintiff from ferreting out and having adjudicated his rights of adequate remedy against the insured and the insurer when he is precluded from initially and directly having the trial court consider all facets of the joint and several liabilities of the defendants in one action, not only as to plaintiff's claim against the insured, but as to any defenses of insurer against insured which might operate to destroy his claim.

A feasible approach to remedy the potential dangers inherent in the above described situations appears to be afforded by the joinder of the insurer. If joinder is allowed initially, all the cards are on the table and all interrelated claims and defenses can be heard and adjudicated reciprocally among all parties and the plaintiff will have the same initial right as insurer now avails itself against plaintiff to protect his rights against the insurer. In this manner the interests of all the parties and the concomitant right to expeditiously litigate the same in concert are preserved.

If it should clearly appear in pretrial procedures that joinder of the insurer interposes issues between insured and insurer in particular case situations likely to unduly complicate trial of the questions pertaining to the liability

of the insured to the injured third party and commensurate damages to be awarded, it would be a simple process under our liberal civil rules for the trial judge on timely motion to sever such complicating issues between insurer and insured for separate trial or adjudication. But such separation for adjudication of issues between insurer and insured would not remove from the case the identity of all parties joined, nor their claims and defenses and their right to participate and protect their respective interests.

For the foregoing reasons, we affirm the judgment of the District Court of Appeal, 1st District, on the merits. We recede from all prior decisions in conflict herewith.

Thornal, Carlton, Adkins and Boyd, JJ., concur
Drew, J., dissents with opinion
Roberts, J., dissents and agrees with Drew, J.

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A. D. 1969

FRANCES RUTH BENNETT SHINGLETON and NATIONWIDE MUTUAL INSURANCE COMPANY, an Ohio corporation,

Petitioners,

v.

ELIZABETH REIFF BUSSEY,

Respondent.

No. 37,636

DREW, J. (dissenting):

The District Court of Appeal, 1st District, held in this case, *Bussey* v. *Shingleton,* 211 So.2d 593 (1968), that the trial court erred in dismissing the appellant Nationwide Insurance Company as a party defendant in an action against its insured, appellant Shingleton, arising out of an automobile collision. The opinion states, p. 596:

> Such liability policies . . . should be construed as quasi-third party beneficiary contracts, thereby giving the injured third party an unquestionable right to join such maker of such insurance policy as a party defendant. This may be accomplished by legislative act, but can be accomplished by what we believe to be a proper construction of Rule 1.210(a), F.R.C.P. to include as a party defendant just those whom the Rule says: "Any person who has or claims an interest adverse to the plaintiff."

Certiorari has been granted on the basis of conflict with the opinion in *Thompson* v. *Safeco Insurance Co. of America,* 199 So.2d 113 (4th Dist. Ct. App. Fla. 1967), stating: "Florida is among those jurisdictions which [do] not recognize the third party beneficiary theory under automobile liability insurance policies in the absence of a policy provision." The latter qualification has obvious reference to

a policy provision necessarily conferring third party benefits, and does not in my opinion serve to distinguish the stated rule in that case from the situation now presented in which a liability insurer has been held a proper party defendant (in an action to determine the insured's liability) under a policy making entry of judgment against the insured a condition precedent to the insurer's liability vel non for the covered amount of the insured's obligation. Apparently, then, the only provision which might *directly* sustain a third party beneficiary action under the policy involved in the present case would be limited to an action after judgment against the insured, a right not disputed in this litigation.

Conflict is also asserted with *Artille* v. *Davidson,* 126 Fla. 219, 170 So. 707 (1936), holding "if there has been no breach of the contract which would create in the insured the present right to maintain an action on the policy, such right cannot accrue to anyone else by reason of having a claim against the insured." The fact that *Artille* involved an indemnity policy does, of course, affect the question of when a breach occurs, but the quoted language is on its face a statement on a point of law in conflict, at least prima facie, with the present decision that a right of action exists in a third party prior to any breach or accrued obligation to pay damages under the insurance contract. At the time suit is instituted against the insured, the insurer does, under the terms of the policy, become obligated to defend on behalf of its insured.

The appellate court in the present case held that Rule 1.210, Florida Rules of Civil Procedure, authorizes direct action against the insurer in this situation by its provision as follows:

> Rule 1.210. PARTIES (a) *Parties Generally.* Every action may be prosecuted in the name of the real

party in interest. . . . All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs, and *any person may be made a defendant who has or claims an interest adverse to the plaintiff.* Any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause. . . . (Emphasis added).

The initial premise of the opinion is correct to the effect that the policy provision against joinder of the insurer[1] is not conclusive: ". . . we do not feel that a party, corporate or otherwise, can by such provision preclude proper legal action being brought against it, if the facts warrant an action."[2] I believe, however, that the court erred in finding that the facts and policy provisions otherwise warrant an action, and in finding that Rule 1.210, *supra,* authorizes joinder of any parties who have adverse interests, without recognition of the procedural character of the rule and its necessary limitation to parties with adverse interests which are *independently actionable.*[3] When the only existing obligation of the insurer under the policy is to defend a claim in behalf of its insured, I am unable to find any cause of action which might be vested in a potential third party beneficiary of the contingent liability features of the policy. The financial responsibility law, Chapter 324, Florida Statutes 1967, relied on by respondent, does not under present con-

1. "This policy shall not give any right to join the Company in any action to determine the liability of an insured person or organization."

2. Bussey v. Shingleton, 211 So.2d 593, 596 (1st Dist. Ct. App. Fla. 1968). It seems equally plain, in spite of consideration of the point at length by the court in this case, that a party's concessions or conclusions in other proceedings could leave no real relevance in determining insurers' "interest" in liability litigation.

3. Kirkpatrick v. Parker, 136 Fla. 689, 187 So. 620, 121 A.L.R. 1481 (1939).

ditions place liability insurance contracts in any special statutory classification justifying direct action.[4]

Statutes which permit such an action or joinder have done so without regard to any contrary contractual intent.[5] Examination of the decisions applying these acts indicates the prevailing and more persuasive view to be that substantive contract rights are affected.[6] Even conceding the desirability of some step toward the solution of the numerous and serious problems so fully discussed in the opinion below, the attempt to accomplish this by court rule is manifestly improper and constitutionally beyond our reach.[7]

The majority opinion, in relying solely upon Rule 1.210, *supra*, and our rule-making power under the Constitution for the conclusion there reached necessarily holds that the Legislature is wholly devoid of power to enact laws prohibiting the joinder of insurance companies as parties defendant under the circumstances presented in this case. This has been a matter which for more than half a century has been recognized by this Court to be within the competence of the Legislature. The cases are legion in which this Court has reversed trial courts for

4. "This does not affect the function and obligation of a liability insurance policy, nor does it change the right, obligation or responsibility of the respective parties involved. . . ." Hayes v. Thomas, 161 So.2d 545, 546 (2d Dist. Ct. App. Fla. 1964).

5. Appleman, INSURANCE LAW AND PRACTICE, Vol. 8, §§ 4861 *et seq.*; 29A AM. JUR., *Insurance*, §§ 1485-1495 (1960).

6. "It has been held that, in determining the propriety of a joinder of the insurer, the law of the forum should control, rather than the lex loci delicti." Appleman, *supra* note 5, at 315. *See also* Posner v. Travelers Ins. Co., 244 F. Supp. 865 (N.D. Ill. 1965). *Cf.* Mock v. Maryland Cas. Co., 6 So.2d 199 (La. 1942).

7. Section 3, Article V of the Florida Constitution, limits our rule-making power to "practice and procedure." *See also* State v. Furen, 118 So.2d 6, 11, 12 (Fla. 1960); and Lundstrom v. Lyon, 86 So.2d 771 (Fla. 1956).

even permitting the suggestion in the presence of the jury that the defendant was insured. Such opinions are, in my judgment, wholly irreconcilable with the idea that we now have the power, by the simple process of adopting a rule of procedure, to permit such an insurer to be made a party to such litigation. This is substantive law—something that only the Legislature may regulate. We are, indeed, treading on sacred ground. Whatever may be my views on what is best—or what the rule or law should be[8]—I do not think we have the right or the power to do that which has been done in the majority opinion.

I dissent.

Roberts, J., concurs

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8. Florida has been free of long delays in the trial and disposition of these cases. I foresee the distinct possibility of a reversal of this situation where, in one trial, all the many facets of the provisions of these policies may be litigated along with the question of damages and liability.